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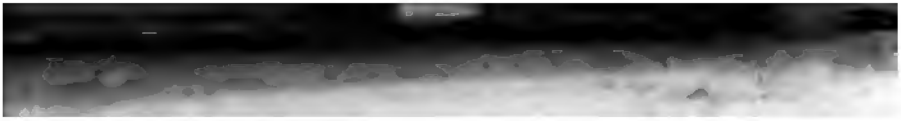
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CASES

RELATING TO

RAILWAYS AND CANALS

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity:

1835 TO 1840.

BY

**HENRY ILTID NICHOLL, THOMAS HARE, AND
JOHN MONSON CARROW, ESQRS.**

BARRISTERS AT LAW.

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A

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ERRATA.

- Page 44, n. (b), for "2 Myl. & Cr." read "1 Myl. & Cr."*
143, l. 14, for "Lord," read "Vice."
312, l. 20, for "Blackemore," read "Blakemore."
318, l. 4, insert a semicolon after "width."
318, l. 5, insert a comma instead of a semicolon after "fences."
318, l. 5, from bottom, for "plains," read "planes."
453, l. 27, for "Wakefied," read "Wakefield."
*532, l. 4, from bottom, add a reference to Gully v. The Bishop of Exeter,
5 Bing. 42.*
540, n. (a), dele "Ante, 368, S. C."
543, do. do.
544, do. do.
545, do. do.
546, do. do.
556, n. (b), substitute "3 P. & D. 122," for the words of the note.

RAILWAY CASES.

In the High Court of Chancery.

Between WILLIAM RANGER, - - - Plaintiff,
and
THE GREAT WESTERN RAILWAY COMPANY,
JAMES CORDY, RICHARD RANGER, and
GEORGE RANGER, - - - Defendants.

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August 7th
and 8th.

THE bill stated that, by an act of Parliament made in the fifth and sixth years of the reign of William the Fourth, in-
The plaintiff entered into three contracts in writing with a Railway Company, whereby it was agreed (inter alia) that the engineer of the Company should, every fortnight, ascertain the value of the work done according to its quantity and relative proportion to the whole works, and that the plaintiff should thereupon receive 80% per cent. of such value, the remaining 20% per cent. being reserved by the company until such reserve amounted to 4,000%. That, if the engineer of the Company should not be satisfied with the works, the Company should be enabled, after notice given to the contractor, and his default of a satisfactory compliance with its terms for the space of seven days, to take possession of the works, and thereupon not only the plant and materials of the contractor, but also the value of the work done and not paid for, and the reserve fund, should become forfeited to the Company.

For the performance of two of the contracts the plaintiff, with two sureties, and for the performance of the third with such two and an additional surety, executed joint and several bonds to the Company.

A further contract, not in writing, was entered into by the plaintiff and the Company, for executing certain other parts of their works at stipulated prices.

In the course of the work the Company advanced several sums of money to the plaintiff upon the security of his plant and machinery upon the works comprised in the written contracts, and of the reserve fund.

The Company having given a notice as above mentioned, and having, at the expiration of seven days therefrom, taken possession of the works, plant, and machinery comprised in all the contracts, the plaintiff filed his bill, insisting that the engineer had not so estimated the works as to give to the plaintiff the 80% per cent. to which he was entitled, and that upwards of 30,000% was due to him under the several contracts for works actually completed, insisting that no forfeiture had been incurred by him, and that by the terms of the deed of mortgage the use and possession of the plant and machinery thereby assigned to the Company was expressly reserved to the plaintiff, and praying that the Company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end, and praying, in either alternative, for the taking of accounts between the plaintiff and the Company.

The Company demurred, first, for want of equity; secondly, for multifariousness.—*Held*, by the Vice-Chancellor on the first point, allowing the demurrer that the remedy of the plaintiff was at law only; but *held* by the Lord Chancellor, reversing his Honor's decision, that the facts alleged by the bill, if proved, would entitle the plaintiff to relief in equity. *Held*, by the Vice-Chancellor on the second point, and by the Lord Chancellor affirming his Honor's decision, that the demurrer for multifariousness could not be sustained.

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tituled, “ An act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called the Great Western Railway, with branches therefrom to the towns of Bradford and Trowbridge, in the county of Wilts,” it was enacted that certain persons therein named, and all other persons and corporations, who had subscribed or should thereafter subscribe towards the said undertaking, and their several and respective successors, executors, administrators, and assigns, should be a body corporate by the name and style of “ The Great Western Railway Company,” and by that name might sue and be sued. That certain other acts of Parliament have since been made, enabling the Company to alter and extend the line of railway.

That the Company have divided the line of railway into districts, termed the Bristol District and the London District; and in the contracts which they have entered into for the works of the railway, they have used the letters B and L as marks to designate the contracts and the district respectively, together with a number or figure for further distinction.

That, under the provisions of the acts, the Company have entered into certain contracts with the plaintiff. That one of such contracts is a contract for the execution by the plaintiff of certain works for completing [with some exceptions] a portion of the railway distinguished in the maps deposited with the clerks of the peace of Bristol and Somersetshire, with the No. 8, and such contract is designated by the figure and letter 1 B, and is as follows:—

This indenture, made the 19th of March, 1836, between the Great Western Railway Company, of the one part; and William Ranger, of the other part: [After reciting that W. Ranger had agreed to execute the works on a portion of the railway, according to the specifications, drawings, and plans which had been prepared by Mr. I. K. Brunel, upon the terms and conditions expressed in such contract]:

Witnesseth, that for the purposes and considerations herein mentioned, W. Ranger doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the Great Western Railway Company, and their successors, that he will well, substantially, and in a good, lasting, and workmanlike manner, make, do, execute, and complete the earthwork, tunnels, permanent fences, drains, bridge, masonry, and all the excavations, culverts, drains, fencing, ditches, and other works whatsoever mentioned and described in the specification hereunder written by way of schedule; and will find and provide all the requisite labour, tools, and materials, according to the directions contained in the act of Parliament, and in the specification and drawings, and such additional or other instructions and drawings, as shall from time to time be given or furnished by the principal engineer for the time being of the Company, or his assistant resident engineer; and will duly execute, provide, and complete as well the works and materials described and set forth in the specification or drawings, as also the works and materials thereby implied according to such specifications and drawings; and will abide by, perform, follow, and fulfil all the stipulations, requisitions, directions, and instructions in such specification set forth: And further, that the several works shall be commenced within ten days next after a notice for that purpose shall have been given to W. Ranger by the principal or assistant resident engineer, and the whole of the works, and each and every part thereof, shall be executed, performed, and fully completed within the respective times in the specification mentioned: And further, that W. Ranger will, during the progress of the works, and for the space of one year, to be computed from the time when all the works shall have been completed and delivered over to the Company, maintain and keep in good and perfect repair and condition, including all accidents, from whatever cause arising, the earthwork, tunnels, permanent fences, drains,

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bridge, masonry, and other works, including all extra, additional, or altered works that shall be done, according to the present contract, or the specification, in, by, and with all necessary reparations and amendments whatsoever, and find and provide all the requisite materials for the doing thereof; and in such good repair and condition will leave the same at the expiration of the year aforesaid: And also, that W. Ranger will execute and complete all the said works with materials of the best quality, and in the most workmanlike manner, to the satisfaction in all things of the Company, and their principal and assistant resident engineers, clerks of the works, surveyors, or inspectors, and in all respects comply with and abide by the true intent and meaning of the specification, drawings, directions, instructions, and of these presents: And further, that in case the Company, or their principal engineer for the time being, shall at any time or times be of opinion, that a sufficient number of workmen are not employed by W. Ranger in the execution and completion of the works, or any of them, with reference to the completion thereof within the time in which the works are agreed to be done, or that the works are not progressing with due diligence or dispatch, with reference to the completion thereof within such time, then and in every such case it shall be lawful for the Company, by a written notice or notices, signed by the Company, or by the principal or assistant resident engineer, to be delivered to W. Ranger [as therein mentioned], to require that he provide such an additional number of workmen as the principal or assistant resident engineer may think necessary or reasonable to be kept or employed in the works, either permanently or for a limited period, as the principal or assistant resident engineer shall by such or any other written notice or notices require; and in case W. Ranger shall not, within three days next after any such notice, provide the additional workmen required, and in all respects comply with the notice, then and in every such case, it shall be

lawful for the Company, or their agents, to provide such additional workmen, and to continue to employ them for such length of time as shall have been required by the principal or assistant resident engineer, by such notice or notices as aforesaid, and at such weekly or other payments or wages as the principal or assistant resident engineer may think proper, which payments shall be made and deducted out of the monies which may then remain due to W. Ranger, by virtue of these presents; and the Company shall be at liberty to use the tools and materials provided for the construction of any of the works; and also to provide such other materials as may be requisite for proceeding with the same as aforesaid; and in case the balance then due to W. Ranger shall be insufficient to cover as well the payments of wages, as the expenses incurred for providing materials as last aforesaid, then W. Ranger, his heirs, executors, or administrators, shall and will make good and pay to the Company the deficiency, on demand: And further, that W. Ranger shall, during the progress of the works, provide or keep one or more competent foreman or foremen to superintend the works, and to remain constantly during the hours of work upon the site of the works, and that, if the principal or assistant resident engineer for the time being shall at any time consider any such foreman or foremen incompetent, or as acting improperly, it shall be lawful in any such case for such principal or assistant resident engineer to give notice in writing to W. Ranger, to remove or supersede him or them, and put another or others in his or their place or places; and in case he shall neglect to do so within one week after such notice, it shall be lawful for the Company so to do, and such weekly payment shall be deducted out of the monies which may be due to W. Ranger, by virtue of these presents.

[Then followed clauses by which W. Ranger agreed to indemnify the Company against any loss or damage arising from the interference with, or obstruction of any public or private road or path; and that he would not enter upon

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or use any lands of which possession should not be given to him without such consent as therein mentioned.] And also that W. Ranger will deposit all the spoil earth which shall arise from any excavations, and which may not be required for the purposes of any of the said works, at such places as shall, from time to time, be fixed and determined by the principal or assistant resident engineer of the said Company.

[Then followed clauses, by which W. Ranger agreed that he would compensate the owners and occupiers of adjoining lands, and all persons interested in any streams, or waters, and all other persons whomsoever, for any damages to be by them sustained in the execution of the works; that he would not injure the works of other contractors; and that he would indemnify the Company in respect of any such damages or injury; that he would not assign the contract, or make any sub-contracts, except with such consent as therein mentioned.] And further, that, in case W. Ranger shall become insolvent, or be declared bankrupt, or shall, from any cause whatsoever, other than any arising from the acts of the Company, their engineer, or authorized agents, be prevented from, or be delayed in proceeding with and completing the works according to the contract, or shall not commence or proceed in the works to the satisfaction of the Company, it shall be lawful for the Company, if they shall think fit, to give or cause to be given a notice or notices in writing, either under the common seal of the Company, or signed by two of the directors thereof, requiring him to enter upon, commence, and regularly proceed with the works; and in case he shall, for seven days after such notice, make default in commencing or regularly proceeding with the works, it shall be lawful for the Company to employ any other respectable workman, or workmen, either by contract, or measure and value, or otherwise, to proceed with the works, and to complete the same, and pay or cause to be paid to such workman, or workmen, the amount of

his or their charges for the same, and for all necessary materials, tools, utensils, engines, and machinery to be found and provided for such completion, out of the monies which shall be then remaining due to W. Ranger on account of this contract: And further, that the monies which, previously to such default, shall have been paid to W. Ranger on account of any work or materials then already done, executed, or provided by him, shall be considered as the full value, and be taken by him in full payment and satisfaction, not only of and for the work in respect of which payment may have been made, but likewise of and for any other work and materials which W. Ranger shall have then done, executed, or provided, although no such payment may have been previously made in respect thereof: And further, that all balance and monies which then or hereafter would have been or become due to W. Ranger under this contract, if this present clause had not been inserted, together with all the tools and materials then delivered for the purposes of the works hereby contracted for, and then being upon or about the site of the work, shall, upon such default, become, and be in all respects considered as the absolute property of the Company: And further, that if the balance monies, and materials, so to become the property of the Company, shall be insufficient to cover such charges for workmen and materials, and also the charges and expenses of keeping such works in repair for the space of one year after the completion thereof, then W. Ranger, his heirs, executors, and administrators, shall and will make good and pay to the Company such deficiency on demand: And further, that all materials brought and left on the site of any works to be done under the contract by W. Ranger, or by his order, for the purpose of being used in or about carrying on the works, shall, from the time of their being so brought and left as aforesaid, be considered as the property of and belonging to the Company, and shall not, on any account or pretence whatsoever, be

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taken away by W. Ranger, his executors, or administrators, or any person or persons whomsoever, without the special license and consent of the Company; but the Company shall not be in anywise answerable or liable for any loss or damage which may happen to or in respect of the materials, either by such materials being lost, stolen, or injured by weather or otherwise. [Then followed clauses for the removal, by W. Ranger, or, on his default, by the Company at his expense, of any materials disapproved of by the engineer; and for the removal and re-execution of any works, appearing, during their progress, or within twelve months after their completion, to the Company or their engineer to be unsoundly or improperly executed, notwithstanding any certificates as to their due execution, and without any extra charge, or the allowance of any additional time for the same.]

Provided always, and it is hereby declared and agreed, by and between the parties hereto, that all such works, in the specification described or referred to as extra works, which the principal or assistant resident engineer shall, by any writing under their respective hands, require to be made and executed, shall be, and the same are deemed and considered, as included in the covenants and agreements hereinbefore contained on the part of W. Ranger, whether such extra works be or be not expressly mentioned; and that all such extra works shall be fully and completely executed and performed, according to the true intent and meaning of these presents, and of the specification, within such reasonable period or periods, as the principal, or assistant resident engineer, shall appoint; and that such extra works shall be paid for by the Company at the times, and after the rate, and in the manner hereinafter mentioned: And further, that if the Company shall think proper at any time to make any alterations, additions, or omissions to or in the several works, including such extra works, or any of them, they shall be at liberty so to do, upon giving W. Ranger

Written instructions for such alterations, additions, or omissions, signed by their principal or assistant resident engineer; but W. Ranger shall not be considered as having authority for any alteration, addition, or omission, nor as entitled to make any claims to the value or in respect of such alteration or addition, without such written instructions signed as aforesaid, although the same may have been actually executed by W. Ranger: And further, that the period or periods for finishing and completing all such additional or altered works shall be fixed by the principal, or assistant resident engineer; and that no such alteration, addition, or omission shall vacate this present contract, or affect the same beyond what may be the necessary consequence of any such alteration, addition, or omission, and the same shall be ascertained and valued by admeasurement and valuation, in all respects according to the price of labour and the several articles respectively set forth in the schedule of prices annexed to the tender which W. Ranger has made in respect of the works hereby contracted for, and a copy of which is set forth in the schedule hereunder written; and that the value thereof, as ascertained, shall be added to, or deducted from, the amount of the contract, as the case may be, and the addition in value, if any, paid for in the manner and at the time or times hereinafter mentioned: And it is hereby further agreed by and between the parties, that the principal or assistant resident engineer shall not set out any of the works, or be bound to furnish copies of the original drawings in his possession for the use of W. Ranger, but that W. Ranger may take copies of the drawings deposited with the assistant resident engineer, and any deviations made in the works from the original drawings or the specification, except what are ordered by the Company, or their principal or assistant resident engineer, in writing as aforesaid, shall be altered and corrected by and at the expense of W. Ranger. [Then followed a clause providing for the removal, by W. Ranger, of build-

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ings, walls, fences, and trees under or upon the land to be occupied by the works in manner therein mentioned.] And it is hereby further agreed, by and between the parties, that W. Ranger shall and will generally do, execute, and provide, not only all the work and materials respectively expressed, specified, or referred to in the specification or drawings hereinbefore referred to, but likewise all such works and materials as are necessarily implied, or may be reasonably inferred in or from the specification and drawings, although the same may not happen to be therein expressly mentioned as to be done by W. Ranger; the true intent and meaning of these presents being, and hereby declared to be, that the works and materials hereby contracted to be done, executed, and provided, shall include all that is requisite for the construction of the said earthwork, tunnels, permanent fences, drains, bridge, masonry, and other works, including such extra works; and also, that, in the event of any dispute arising between W. Ranger and the resident engineer, surveyor, or inspector, concerning any of the matters aforesaid, W. Ranger, his executors, administrators, and assigns, shall and will abide by, observe, perform, fulfil, keep, and in all things obey the decision in writing of the principal engineer: Provided always, that, in all cases in which there shall be or appear to be any variation in the agreements, stipulations, and provisions contained in these presents, and the specification hereunto annexed, the agreements, stipulations, and provisions contained in these presents shall be, and be considered as, those to be performed and executed by W. Ranger, but in all cases, matters, and things, not sufficiently provided for and regulated by these presents, the agreements, stipulations, and provisions contained in the specification shall be, and be considered as, those to be observed, performed, and executed by W. Ranger: Provided also, and it is hereby agreed and declared by and between the parties hereto, that if W. Ranger shall be prevented from, or materially impeded or delayed in,

the proceeding with or completion of any other of the works which, under this contract, ought be performed and executed by him, by reason or in consequence of any acts which may, contrary to the true intent and meaning of these presents, be done or omitted to be done by the Company, or any authorized engineer or agent on their behalf, such prevention, impediment, or delay shall not vacate these presents, or otherwise affect the same, except that, in every such case, [and in no other case], the principal engineer of the Company shall determine whether any, and, if any, what extension of time ought to be allowed for the execution and completion of all or any of the works hereby contracted for, and whether any, and, if any, what compensation or allowance ought to be paid or allowed to W. Ranger in respect of such prevention, impediment, or delay, and in what manner such compensation or allowance ought to be paid or allowed, and the determination of such principal engineer shall be binding and conclusive on all parties: And this indenture further witnesseth, that, in consideration of the covenants hereinbefore contained on the part of W. Ranger, his heirs, executors, administrators, and assigns, to be performed, the Company do hereby, on behalf of themselves and their successors, covenant and agree with W. Ranger, his executors, and administrators, that they shall and will pay the sum of 63,028*l.* 16*s.*, agreed to be paid for the completion of the said earthwork, tunnels, permanent fences, drains, bridge, masonry, and other works, exclusive of extra work, and for the providing of the materials for the same, at the times and in the manner following:— The Company shall and will, at the expiration of fourteen days, to commence and be computed from the day on which the works shall have been commenced, pay unto W. Ranger, his executors, administrators, or assigns, four-fifth parts of the whole value of the works which shall have been executed, such value to be estimated by the principal or assistant resident engineer, having reference as well to the prices set

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forth in the schedule to the tender, or copy of the tender hereunder written, as to the entire costs of the whole work; the execution of such works to be certified in writing by the principal engineer, as after mentioned, and so, from time to time, at the expiration of every succeeding fourteen days, in like manner, shall and will pay unto W. Ranger, his executors, administrators, or assigns, four-fifth parts of the whole amount or value of the works which shall have been actually performed during the preceding fourteen days, until the one-fifth part, or 20% per cent., to be retained from time to time by the Company, shall, either alone or together with the sums to be retained out of the estimated value of the extra works which may be executed and certified from time to time as after mentioned, amount to the sum of 4,000£., and shall and will thenceforward, until the whole of the works hereby contracted to be done shall be completed, at the expiration of every succeeding fourteen days, pay unto W. Ranger, his executors, administrators, or assigns, the full value of the works, to be ascertained and certified as aforesaid, which shall have been done in the preceding fourteen days, and shall and will, at the expiration of one calendar month next after the whole of the works are completely finished to the satisfaction of the principal engineer of the Company, to be certified by him, pay unto W. Ranger, his executors, administrators, or assigns, the sum of 2,000£., being one equal half part of the monies to be so retained by the Company, without any interest thereon, and shall and will, at the expiration of one month after the termination of the year during which the works are covenanted to be kept in repair by W. Ranger, [the same having been certified by the engineer in the same manner as the completion of the works], pay to W. Ranger, his executors, administrators, or assigns, the balance of the sum to be retained by the Company, together with interest thereon at the rate of 4% per cent., to be computed from the day on which the several works shall have been so completed and

certified as aforesaid: And further, that if W. Ranger shall, to the satisfaction in all respects of the principal engineer of the Company, have completed and finished the whole of the works within the period appointed in the specification for the completion thereof, the Company shall pay to W. Ranger the sum of 150*l.* for each and every week which shall elapse between the time of the actual possession of the works, and the time appointed for that purpose in the specification: And further, that the Company shall and will pay unto W. Ranger, his executors, administrators, or assigns, for or in respect of the extra works, at and after the prices in the specification hereunder written, and set forth in the schedule of the tender hereunder also written, according to the true intent and meaning of the same respectively, the amount and value of such extra work, such amount to be from time to time certified by such principal engineer, and to be paid and payable in the same manner, and subject to the same deductions as above directed with respect to the sum of 63,028*l.* 16*s.*: Provided nevertheless, that W. Ranger shall not be entitled to demand or receive any of the aforesaid payments, until the works on which such payments are respectively made to depend shall have been completed to the satisfaction of the principal engineer of the Company; and the principal, or assistant resident engineer, by his direction, on notice given by W. Ranger for that purpose, shall, without delay, examine the works so from time to time to be completed; and if the same shall be so completed, the principal engineer shall certify the same to the Company; and thereupon W. Ranger, his executors, administrators, or assigns, shall be entitled to recover from the Company the amount of the payments then due in respect of the works so certified to be done, subject to the retaining thereof of such sums as hereinbefore mentioned: And it is hereby further agreed, that, during the progress, and until the completion of the works, the decision of the principal engineer of the Company,

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with respect to the amount, state, and condition of the works actually executed, and also in respect to any and every question that may arise concerning the construction of the present contract, or the aforesaid drawings, tender, or specification, or the general or particular description of works therein contained, or the nature of materials, or the execution of the works, or any other matter or thing whatsoever relating to the same shall be final and without appeal; but if any difference of opinion should arise between the Company or the engineer, or W. Ranger, after the completion of the contract, as to any matter of charge or account between the Company and W. Ranger, such dispute shall be referred to, and finally settled and concluded by the arbitration of their engineer, on the part of the Company, and an engineer appointed by W. Ranger, on his part; and in case of their not being able to agree, a third person shall be named as arbitrator by such two engineers; the decision of any arbitrator so named being final and binding on both sides.

The bill then stated the material parts of the specification annexed to the contracts and the general description and order of proceeding in both the contract and extra works, the periods of commencement and completion, and the penalties and premiums payable according to the time at which the several works should be completed. The bill also stated the general stipulations annexed to the contract, one of which was as follows :—“ The contractor must satisfy himself of the nature of the soil; of the general forms of the surface of the ground; of the quantity of materials required for forming the embankment, and all matters which can in any way influence his contract; and no information upon any such matters derived from the drawings or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks, or from fulfilling all the terms of the contract.” Then followed the schedule of prices of the works.

The bill proceeded to state that the plaintiff and J. Cordy and R. Ranger, his sureties for the due performance of such contract, executed their joint and several bond to the Company.

That another of the contracts entered into between the Company and the plaintiff was a contract for the executing, by the plaintiff, of certain works for completing [with certain exceptions] a portion of the railway adjoining to that comprised in the first contract, and which second contract is designated contract 2 B, and contains provisions, and is accompanied by specifications, drawings, and schedules similar in effect to those in contract 1 B, with such variations only as are applicable to the different works. That a bond was executed by the plaintiff and his said sureties, for the due performance of contract 2 B, similar to the bond in respect of contract 1 B.

That the other contract entered into between the Company and the plaintiff, is a contract for the executing by the plaintiff, of works [with certain exceptions] on a portion of the railway in the parish of Reading, and other adjoining parishes, and is designated as contract 8 L. That the provisions contained in contract 8 L, and the provisions, specifications, drawings, and schedules annexed thereto, are in substance, and with such variations only as the different nature and circumstances of the respective works rendered necessary, similar to those contained in contracts 1 B, and 2 B. That for the due performance of the contract 8 L, the plaintiff, his said sureties, and G. Ranger, as a further surety, executed their joint and several bond to the company.

That the works by the several contracts undertaken by the plaintiff, consisted of the works described in the specifications and drawings, and of such extra works as might be from time to time ordered by the engineer of the Company. That the gross sum mentioned in the body of each of the contracts, as the price to be paid to the plaintiff for

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the works to be done by him, was the sum to be paid for the specified works, exclusive of the extra works, which were to be paid for according to the schedule of prices annexed to each of the contracts, so far as the same were applicable, and if not, then according to the value thereof, to be determined by the engineers, as far as possible, from the prices of the works most similar thereto.

That I. K. Brunel is the principal engineer, and G. F. Frere and B. H. Babbage are assistant engineers, resident near the site of the works comprised in contracts 1 B, and 2 B; and — Hammond and W. G. Owen are the assistant engineers, resident near the site of the works comprised in contract 8 L, or the works substituted in lieu thereof, as after mentioned.


That in April and May, 1836, the plaintiff, in consequence of, and within ten days after, orders received from the principal or assistant engineers, duly commenced the works in contracts No. 1 B and No. 2 B, and, for the purposes of such works, brought and placed upon the ground within the limits of those contracts certain plant and machinery of large value. That the plaintiff duly and diligently proceeded with the works, and in all respects fulfilled, or used his utmost endeavours to fulfil the terms of the contracts on his part; and, although the works have not been completed within the limited period, the non-completion thereof has not arisen through any default of his, but from the causes after mentioned. That great delay in the progress of the works has been occasioned by the circumstance of the plaintiff being required, by orders of the Company, to make, and he has made, great additions to and alterations in the works, and material deviations from the line and plans originally laid out; and further delay has been occasioned, by the circumstance of the strata through which the works had to be carried proving to be of a character different to that which, when the contracts were made, it was represented by the Company or their agents to be, and

different from what it appeared to be by the trial pits made by the Company; and further delay has been occasioned by the circumstance, that the plaintiff has in many instances been directed by the Company, or their engineers and agents, to carry on the works in an injudicious manner. That a material part of the works in contract 1 B, consists of tunnel work, and the strata through which the tunnels were intended to pass were supposed, and, from shafts sunk by the Company to ascertain the same, appeared to be sand-stone, and, accordingly, were so represented in the specification, and the schedule of prices applicable to such work was calculated upon that supposition. That, upon proceeding with the excavations, it was found that nearly the whole of the strata was either *dunns*, or *pennant* stone, both extremely difficult to work, and only a small part sand-stone. That, if such facts had been known, the schedule of prices would have been at the least four times the amount of those in the contract No. 1 B; and the Company so framed the contract as to mislead the plaintiff with respect to the strata. That the shafts sunk by the Company were not sufficient in number or depth to ascertain the strata, and before the plaintiff took the contract they were partly filled with earth and water, and he relied on the description of the strata in the contract, and that proper means had been taken by the Company to ascertain the nature thereof, and he signed the contract without further investigation. That, if proper trial pits had been sunk by the Company, the real nature of the strata would have appeared to the plaintiff, and he would have stipulated for remunerating prices. That, owing to the nature of the strata, delay and great expenditure in plant, materials, and labour, has been occasioned, beyond what would have been required had the same been sand-stone. That, upon ascertaining the strata to be as aforesaid, the plaintiff apprised I. K. Brunel, that it would be impossible to complete the tunnels within the time limited in contract 1 B.

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That the engineer and directors of the Company were satisfied of the impracticability of completing the tunnels within the time limited in the contract, but the plaintiff still proceeded with them in the best possible manner, and with all the expedition which the nature of the strata would allow of, up to the time of the Company taking the tunnels into their own hands, as after mentioned. That the plaintiff was prevented from building a bridge, called the Avon Bridge, comprised in contract No. 1 B, within the said time, in consequence of stone not being obtained from the cuttings and tunnels in such contract adapted for the building of the bridge, as it was represented to the plaintiff, and stipulated in the contract there would be. That, by reason of such stone not being obtained, and it being necessary to continue the embankment on the opposite side of the river, the plaintiff was compelled to erect a temporary bridge for the transport of materials across the river, occasioning a great additional expense and loss of time. That considerable delay was occasioned by the engineer omitting to give directions for the disposal of the excavated earth which was not required for the embankments. That other delay was occasioned by additions, deviations, and alterations in the works being ordered to be made by unskilful persons, and pupils of the principal engineer, and which orders, after the works had been proceeded with, were often countermanded and cancelled, and the works done ordered to be removed and destroyed.

That the Company, their engineer or agents, well knew that the plaintiff could not proceed with the construction of the tunnels more rapidly than he was proceeding therewith, owing to such circumstances, yet complaints of delay were made by the Company to the plaintiff, and particularly in July, 1837, I. K. Brunel sent to the plaintiff a letter, as follows :—" The works upon 1 B. are not proceeding in a satisfactory manner, and the rate of progress is so trifling, that I cannot sign certificates unless a complete change takes

place ; it is difficult to point out any particular part which is delayed, every part is so much behind. Avon Bridge work is contemptible ; No. 1 tunnel hardly proceeds ; No. 3 seems almost abandoned : unless greater progress is made during the next fortnight, it will be impossible to certify that the work is completed within the time, and your payments must, in consequence, stop. Of course, you are aware, that penalties ought now to be deducted for non-completion of Avon Bridge."

That the plaintiff thereupon represented to I. K. Brunel, that such complaints were unjust, and I. K. Brunel, upon explanation, was satisfied thereof, and, accordingly, did not withhold any certificate, but continued to certify for the payment of monies to the plaintiff at the end of every fourteen days.

That the Company and their engineers were at length aware, that it would be impossible for the reasons aforesaid for the plaintiff to complete the tunnels within the time limited by the contract No. 1 B, and that the delay was not imputable to him ; and that to require him to complete the same on the terms of the contract would be unjust towards him, and they resolved to take the same into their own hands. That the plaintiff attended at the office of the Company, on one of the board days, and had an interview with Mr. Osler, the secretary, and Mr. Frere, when Mr. Osler said that they were deputed to make a communication to the plaintiff, contained in a paper writing, which was then read by Mr. Frere, who stated that it contained a proposal which the Company required the plaintiff to sign. That he requested three or four days time to consider it, and also to have a copy of the proposal. That Mr. Osler said such time could not be allowed, as the plaintiff was expected to sign the same on the following day, and that the directors would be much surprised at his for a moment hesitating to sign the same, as it was for his benefit ; and with regard to the request of the plaintiff to have a copy of the paper writing, he was desired to sit down and write the same from

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the dictation of Mr. Frere, and the plaintiff accordingly wrote the purport thereof as dictated, and took away the same with him, and Mr. Frere stated in answer to a question to that effect, that the plaintiff would not be allowed to make any alteration therein. That, in consequence of the time allowed being so short, the plaintiff was unable to consult legal or other advice as to the propriety of signing such proposition, but was compelled to, and he in fact did, sign on the next day the said paper writing, which was as follows:—

“Proposition.— Notice having been given by the Company to resume possession of contracts B 1 and 2, on account of arrears in the works, I submit the following arrangement for the approval of the directors. [The proposition, after detailing certain proposals, as made by the plaintiff, for permission to remove part of the plant from portions of the works to other parts, and to continue the works on portions of the two contracts, proceeded thus:] And, in consideration thereof, I undertake to place the whole of the earthwork and tunnels on 1 B, [excepting a certain part therein mentioned], under the exclusive control and management of the Company, for the purpose of procuring the completion of the work by other contractors, or by themselves, so as to secure the final opening of that portion of the line on the 24th of November; and I undertake to defray all expenses incurred in the performance of the work on an account to be taken after the completion, allowing for the same at the schedule prices in the contract. The arrangement to take effect from the 18th of April; and I agree that, notwithstanding this proposition, the original contract, B No. 1, shall remain in force until all accounts shall be settled between the Company and myself.” That, although the above proposals are expressed to emanate from the plaintiff, they were in fact prepared by the agent of the Company, and the plaintiff signed the same from compulsion, arising from the cir-

cumstances of his being wholly in the power of the Company, by reason of the arbitrary clauses in the contract, and the ruinous loss to which he would be subject if they were not strictly performed.

That, although the proposition was not sealed under the common seal, nor signed by any of the directors, yet it hath been acted upon, and the plaintiff discharged from the further prosecution of the works in contract No. 1 B, and the same continued by the Company; and the plaintiff removed the plant he had thereon to the other works specified in contracts No. 1 B and No. 2 B. That part of the plant was left on the relinquished works at the request of the Company, who have retained the same. That, although the Company have taken upon themselves the execution of the tunnelling works in contract 1 B, the same are proceeding much slower than under the plaintiff's management, and have not been completed within the time limited by the contract; and, consequently, the accounts between the plaintiff and the Company have remained unsettled.

That, during the progress of the works in contracts 1 B and 2 B, it was agreed, on the suggestion of the Company, that the plaintiff should, in addition to those in contract 1 B, complete other works connected therewith, and the plaintiff having submitted a scale of prices, it was accepted by the Company, and he was, in February, directed to proceed with such extension works; but no written contract was entered into, and no time limited for doing the same, [such works being hereafter distinguished as extension contract 1 B]. That the plaintiff accordingly commenced and prosecuted such works, and in doing so was obliged to provide new plant and materials, and also to make use of the old plant and materials. That, after the Company had taken in hand the tunnelling works in contract No. 1 B, the plaintiff proceeded with the remaining works in that contract, and the works in contract No. 2 B, and with the extension works, and would have completed them within the limited

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time but for the following circumstances; and, in fact, the works in 2 B are now within a few months of being completed. That such works have been completed in a superior manner, and have been much admired, both by I. K. Brunel and by the directors of the Company. [The bill then, after a detailed statement of delays and inconveniences, alleged to have been experienced by the plaintiff in the prosecution of the works, and attributing the same to the Company and their officers, proceeded thus:] That the plaintiff has, in fact, been placed in a situation which rendered it impossible literally to fulfil the terms of the contracts 1 B and 2 B.

That, in the interval between the 3rd of July, 1837, and June, 1838, no complaint was made by I. K. Brunel against the plaintiff, and any complaint, which had been made by the assistant resident engineer, had not been made from any personal investigation, but from reports of sub-agents, and all such complaints (although unfounded) had been either attended to by the plaintiff, at considerable pecuniary loss, or the plaintiff had shewn that there existed no grounds for dissatisfaction. That although, previously to February last, complaints were made in respect of the works in contracts 1 B and 2 B, yet, from that time to July last, no complaint has been made or entered in the order books kept for that purpose. That any delay in the works has been productive of greater injury to the plaintiff than to the Company, they having availed themselves thereof as an excuse to withhold from the plaintiff large sums of money to which he was entitled. That, under the contracts 1 B and 2 B, the plaintiff was entitled to have the specified and the extra, or extension works, measured every fourteen days, and, upon a certificate given of the value thereof, to be paid 80% per cent. thereon; the remaining 20% per cent. being retained to form the reserve fund. That the Company have repeatedly omitted to have the works, and in particular the extra and extension works, measured every fourteen days, and even where they have done so, the measurements and valuations

have been improper and insufficient. [The bill proceeded to allege instances of such omissions and inaccuracies of valuation.] That, although payments have been from time to time made to the plaintiff according to the engineer's certificates, yet the same were less than he was entitled to receive under the contracts, and the Company have refused duly to account with him, and he, being under the arbitrary controul of the engineer, has been obliged to accept such payments as the Company chose to make. That, in many instances, such payments have not amounted to the wages of the workmen and other disbursements, and the Company have sometimes, instead of paying the plaintiff, paid the workmen, without his direction.

That although, owing to the refusal of the Company to account, the plaintiff is unable to ascertain the principle or footing on which the engineer has certified the amounts due, yet he has reason to believe that large sums have been deducted on account of penalties for the non-fulfilment of the contracts in cases where either no penalties have been incurred, or, if incurred, have been waived; and that the only cases in which the plaintiff could incur penalties were those specified in the conditions annexed to the bonds accompanying the contracts. That, with the exception of the tunnelling work in contract 1 B, from which he has been relieved, the plaintiff has complied with the limitations of time in the contracts, if due allowances be made for extra and deviating works. That, if the plaintiff has incurred penalties, the remedy of the Company is under the bonds, and not against the amounts due under the contracts; and the Company, knowing that they could not prove the bonds to have been forfeited, have never put the same in suit.

That the contract 8 L was acted upon according to the terms thereof; and subsequently the Company, under the powers of one of their acts, afterwards obtained, resolved to deviate altogether from the line mentioned in that contract.

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That, although the Company could not enable the plaintiff to proceed with the portion of the railway in contract 8 L, yet they employed him, and he agreed to complete the substituted line without any specific contract, and according to the schedule of prices annexed to contract 8 L, or as near thereto as might be. That he has proceeded with the works of such substituted line, [except a certain part which the Company have agreed to take upon themselves], and no complaint has ever been made of the execution or progress of the work, although the substituted line is more expensive and difficult to work than the original line was represented to be. That, for working the substituted line, [hereinafter called the Reading line], the plaintiff has, from time to time, placed upon the ground plant and machinery of great value, and the same now remains thereon. That, for some time after the work on the Reading line had proceeded, the Company paid the plaintiff according to the scale of prices annexed to contract 8 L, and upon the fourteen-day certificates of the engineer, yet for some past such certificates have been given for sums less than those actually due, in the same manner as with respect to the contracts 1 B and 2 B, and the plaintiff has been, for similar reasons as in the cases of those contracts, obliged to accept payments in conformity therewith, and the sums paid have been much less than those due, whether calculated according to the gross sum in contract 8 L, or to the scale of prices annexed thereto. That, in particular, upon examination of the certificates relating to the works on the Reading line to May 1838, and upon comparison of the scale of prices with which the plaintiff was credited therein with the schedule scale, it would appear that the sums certified to be due to the plaintiff were less by the sum of 11,661*l.* 9*s.* than, according to the latter scale, he was entitled to be paid, even assuming the admeasurements specified in such contracts to be correct.

That owing to such deficiencies in the payments by the

Company, the plaintiff requested the Company to advance him money on loan, to prosecute the works, which the Company agreed to do upon the repayment thereof being secured by a mortgage of the plant and machinery upon the lines of railway comprised in contracts 1 B, and 2 B, and on the Reading line, and also of the reserve fund under the contracts; and, accordingly, in and subsequently to May, 1838, the Company advanced certain sums to the plaintiff, who accordingly executed an indenture of mortgage of the above-mentioned premises, for securing the monies then or thereafter to be advanced to him, not exceeding 10,000*l.*, but without interest, and without a limited time for redemption; subject, nevertheless, to a proviso for redemption. And in such indenture was contained a covenant on the part of the Company, to permit the plaintiff to have the full use and possession of the whole of such plant and machinery, in order to enable him to proceed with and complete the works. [The bill then stated two subsequent loans upon such security]. That, since the execution of the indentures of mortgage, and further charge, the plaintiff has maintained upon the works the whole of the plant and machinery comprised therein, and has brought and placed thereon others of large value, not comprised in such indentures.

That, it being a fact well known to the Company, that owing to such deficiencies in their payments, the plaintiff had been obliged to contract debts for providing the necessary plant, machinery, and materials, a committee of his creditors proposed that an application should be made to the Company avowedly in the name of the plaintiff, in order to call their attention to the deficiencies in their payments to him in respect to the Reading line, and to request an account and settlement. That, accordingly, Mr. Lumley, the solicitor of the plaintiff, on the 31st May, 1838, wrote to the directors a letter, which, after setting forth the purport and terms of the contract of the 30th August, 1836, and the schedule of prices annexed thereto, and observing

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minutely on the difference between the sums payable and paid thereunder, and the differences between the prices fixed thereby, and the engineer's certificates, and inclosing a statement exhibiting the same, submitted to the directors: First, that the sum of 11,661*l.* 9*s.* 0*d.* was due on account of such differences, and ought to be paid to the plaintiff; and secondly, that the directors ought to give such directions as would prevent a recurrence of the evil complained of. That, in reply to such letter, Mr. C. Saunders, the secretary of the Company, wrote to Mr. Lumley a letter, dated the 5th June, 1838, stating that the payments had been made in strict conformity with the terms of the contract, the prices having been estimated with regard to the entire contract sum, as well as the prices specified in the tender; and that, upon the works as performed, the directors had reason to believe that a balance was due to them, and not to the plaintiff. That, on the 14th June, 1838, Mr. Lumley again wrote to the directors, requesting an explanation of the statements contained in the letter of their secretary, and desiring to be informed, in case they declined to pay the schedule prices, at what rate they were willing to pay for the future work, in order that if the same was reasonable, the parties might co-operate in causing the work to proceed with all possible expedition. [The bill then set forth letters and other communications between the plaintiff and Mr. Lumley, on his behalf, of the one part, and the directors and their engineers, on the other part, relative to the prices and admeasurements of the work]. That, in June, 1838, the plaintiff was served with a notice, dated 23rd of June, and signed by two of the directors, as follows:—

“ To W. Ranger. Whereas you, W. Ranger, have not proceeded and are not proceeding in the works specified in certain indentures, under the tender intitled contract 1 B, dated the 19th March, 1836, and under the tender intitled contract No. 2 B, dated the 9th of May, 1836, and made between the Great Western Railway Company, of the one

Part, and you, of the other part, to the satisfaction of I. K. Brunel, the principal engineer of the Company; now, therefore, the Company do require you to proceed regularly with the said works, and do hereby give you notice, that in case you shall, for seven days after service hereof, make default in regularly proceeding with the works, the Company will exercise all powers, rights, and remedies, as are in that case by the said indentures provided in favour of the Company. Signed R. Bright. W. S. Jacques." That, upon the receipt of such notice, not being aware of the grounds of complaint, the plaintiff endeavoured to obtain an interview with I. K. Brunel, for the purpose of discovering the same, and, failing to do so, wrote a letter, dated the 29th of June, to Mr. Osler, requesting to be informed of the grounds and particulars of complaint. That Mr. Osler replied by a letter, dated the 30th June, stating, that the Company had been compelled to resort to such proceedings, by the representations of their engineer as to the unsatisfactory progress of the works in contracts Nos. 1 and 2 B, and 1 B extension; that they had forwarded the plaintiff's letter to their engineer, and, unless he certified to them, before the expiration of their notice, that the works had been placed in a state satisfactory to himself, their duty would oblige them to act upon it. That, in reply thereto, the plaintiff again wrote to Mr. Osler, stating that no complaints with regard to the works had been made by the engineer to the plaintiff; that if any such had been made, all reasonable cause for the same would have been removed, and offering to remove the same if then pointed out, submitting that it was unjust to allege generally that the directors "are dissatisfied," without explaining the particular grounds thereof. That no answer was returned to such letter, nor any explanation furnished, nor has the plaintiff ever been apprised of the particular grounds of dissatisfaction expressed by I. K. Brunel; and no opportunity has been afforded him of removing the same complaints. That, on the 2nd July, 1838,

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the Company entered upon, and took possession of the works comprised in contracts 1 B and 2 B, and extension 1 B, and the plant, machinery, and materials thereon, and have since continued, and now are in possession thereof. That such notice was served, not on any grounds of dissatisfaction, or with a view to enable the plaintiff to make any alterations in the works, but in consequence of a previous determination to take such possession, otherwise the Company would have specified the particular grounds of complaint. That, when served with such notice, the plaintiff was proceeding regularly with contracts No. 1 B, and No. 2 B. That, after the Company had taken possession of the works and property aforesaid, they caused notices, dated the 2nd of July, 1838, to be served upon the plaintiff, signed by G. E. Frere, to the purport, that in pursuance of the provisions and authorities contained in contracts No. 1 B, and 2 B, and of the notice, he had taken possession of the works, and the tools, and materials upon the site thereof, to the intent that the Company might complete such works according to the contracts. That, on receiving the same, the plaintiff duly served upon the secretary of the Company a counter notice, protesting against the power and authority of the Company to enter upon or intermeddle with the works, and stating, that he should hold them responsible for any damage occasioned thereby. That, although the Company took possession of the works comprised in extension contract 1 B, and the plant, materials, and effects thereon, yet they confined the notices to the fact, that they had taken possession of the works comprised in contracts 1 B, and 2 B. That the plant, materials, and effects of which the Company have taken possession, comprised the following articles. (The bill particularised them). That among such plant and materials are included, not only those comprised in the indentures of mortgage, but those which have been brought upon the ground since the execution thereof, and which last are alone of the value of 5,000*l*. That, since the

Company so took possession, they have excluded the plaintiff from the works, and intend themselves to prosecute the works, and to use the plant and materials of the plaintiff for such purpose; and also to pursue a similar course with respect to the works on the Reading line, and the plant, machinery, and materials thereon, which are of the value of 40,000*l.* or thereabouts.

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The bill charged that there is now a balance of 30,000*l.* and upwards due to the plaintiff, as he computes the same, besides a large amount for work done for which he is entitled to be paid beyond the schedule prices; and, in particular, that works to a great extent have been done under contracts 1 B and 2 B, which have not been certified, and large quantities of stone have, under orders of the engineer, been removed from the limits of contract 2 B to contract 1 B, and that extra works to the amount of many thousand pounds, have been done by the plaintiff, and that additional costs have been incurred, by the engineer having increased the dimensions of the shafts, and directed the centre line of No. 3 tunnel to be changed after the drift way of the tunnel had been made, for all which, and for the difference in the nature of the stone in the tunnel, the plaintiff is entitled to large allowances, yet no allowance has been made in respect thereof. That great expenses were incurred by the plaintiff in consequence of additions, deviations, and alterations in the original works, and of orders for works countermanded or abandoned, after the same were wholly or partly executed, for which the plaintiff is also entitled to allowances, and which have not been made. That, in numerous instances, the sums certified to be due to the plaintiff have been much less than the sums agreed to be paid to him according to the contracts; that the plaintiff is entitled to separate valuations as to various parts of the extra works to which, from their nature and description, the said schedule of prices do not apply, and if such extra works were fairly valued, the

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amount payable to the plaintiff in respect thereof would be far above the amount payable according to the schedule prices, but that the payments to the plaintiff, in respect of the same, have been greatly below the said scheduled prices; that the payments to the plaintiff by the Company not being the full amount he was entitled to receive, were often insufficient to meet his payments to the workmen employed on the works, and the plaintiff was thereby compelled to have recourse to other sources, at much expense and loss. That, in the progress of the work, it was manifest to the Company and their engineers, that the works, and particularly the tunnel works, ought to be paid for at a much higher rate than was provided for in the contracts, and the Company, therefore, agreed to make and made the plaintiff an advance of 80% per cent. on the work in contract 1 B, and of 20% per cent. on the work in contract 2 B, beyond the contract prices, until they took the tunnels out of his hands. That there has been no delay, on the part of the plaintiff, in the execution of the works, and that the non-completion thereof within the time specified, and the alleged delays, have arisen from the neglect, omission, or acts of the Company or their agents, and, in some instances, from inconsiderate, conflicting, and vexatious orders by the Company and their agents; in other instances, from their neglecting to give orders for work which the plaintiff was not likely to commence without such orders, and which were necessary to be done before other works could be commenced, until long after the plaintiff had required the Company or their agents to give orders for the same, and, by reason of such conduct and acts, the Company and their agents have rendered it impossible for the plaintiff to complete his contracts within the time specified. That, in particular, the plaintiff has repeatedly apprised the Company or their engineers of his inability to proceed with certain embankments comprised in contract 1 B, until they or their engineer had given orders for the construction of the re-

aining wall thereof, which is included in the same contract as extra work, yet no order has been given for the same up to the present time.

That the performance of the contract within the time has been further rendered impracticable by reason of important deviations and alterations, and extra work ordered to be done in connexion with the contract works, all of which occupied considerable time, and for all of which, in proportion to the nature and extent thereof, the plaintiff was entitled to be allowed additional periods of time, yet the principal engineer has not made any such allowances, but, on the contrary, the Company have sought to avail themselves of the time occupied thereby as a ground for enforcing against the plaintiff the penalties expressed in the contracts. That great alterations have been ordered by the engineer in the number, size, and length of the tunnels, in the number and depth of the shafts, in the form of the cuttings, embankments, and slopings, in the character, substance, and style of the masonry, and in various other particulars, all of which have been productive both of delay and expense to the plaintiff, for which no remuneration or allowance has been made to him.

That the plaintiff has always strictly attended to and executed, so far as was practicable, the orders of the engineer, assistant engineers, deputies, and agents, however vexatious or productive of delay the same might be. That the plaintiff has always had a competent number of superintendents, foremen, and workmen employed on the works, and hath always had the works in hand, and the same have never been stopped, except for want of orders from the engineers to enable the plaintiff to proceed, or from the neglects and mistakes of the engineers, their pupils, and agents. That the delay in the completion of the works was in further part occasioned by the principal engineer having given but a small share of his time and attention to the superintendence of the works on which the plaintiff was

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engaged, and having confided the same to deputies, assistants, and agents, who were, in many instances, inexperienced persons, wholly unfit to superintend the works, but have, nevertheless, assumed to superintend the same, and have, in many instances, been at a loss as to the orders to be given, and, in other instances, have given orders wholly erroneous and impracticable, and have complained to the principal engineer of the non-compliance with such orders, and that the principal engineer has, in some instances, adopted such complaints without examination, and, in others, has, upon examination, been compelled to disallow the same; whereupon jealousies and prejudices have arisen against the plaintiff, and he has been exposed to misrepresentations and complaints. That the Company have discharged one of such assistant engineers from his situation on the ground of incompetency. That delay was in further part occasioned by the Company, their directors, and engineers having frequently tried experiments and speculations in regard to the formation and construction of the railway and works, some of which have wholly failed, and others, partially successful, have produced great expense and delay, whereupon the Company, their engineers, and agents, have sought to throw the blame of such failures, expenses, and delays upon the contractor.

That it appears, by the reports from time to time made by the directors to the proprietors of the Company, and particularly a report of the 31st of August, 1837, that the delay in completing the works arose from some of the said circumstances, and not through any misconduct or neglect of the plaintiff. That the plaintiff has not justly incurred any penalties under the contracts for not having proceeded with or completed the works within the time limited for the same, as the Company pretend; and, in particular, that he has not, under contract 1 B, justly incurred any penalties in respect of the non-completion of the headings through the tunnels, or of the non-erection of the bridge over the

river Avon. That, owing to the nature of the strata of such tunnels as aforesaid, it was utterly impossible by any means, however extensive or powerful, or however well-ordered or directed, to complete the headings through the tunnels within the time limited by contract 1 B; and that, if the plaintiff has incurred any penalties in respect of the same, yet the Company have waived such penalties by taking the works of the said tunnels out of his hands. That, when the Company so took the tunnels into their own hands, they did not claim or intend to enforce any such penalties, being convinced that the non-completion thereof had arisen from the circumstances aforesaid. That the non-erection of the bridge over the Avon arose from there being no stone, or an insufficient quantity of stone, as aforesaid, and that the plaintiff was not ordered by the engineer to take the stone off the ground included in contract 2 B, until some months after the time when he ought to have commenced the bridge, and when it was impossible to complete the bridge within the time specified. That fetching the stone for the bridge from such additional distance would have alone occupied so much time as to prevent the plaintiff from completing the bridge within the time specified; and, up to the present time, a sufficient quantity of stone has not been obtained for its completion. That, in none of the particulars mentioned in the bonds, have any penalties been incurred; for, though complaints have sometimes been made to the plaintiff concerning the works, yet such complaints have been trifling and frivolous, or, if in any respect well founded, the cause thereof has been immediately removed. That such complaints have, for the most part, been made by the subordinate agents of the Company, and in no instance since the letter of the 3rd July, 1837, by I. K. Brunel. That, subsequent to the date of that letter, I. K. Brunel negotiated and engaged with the plaintiff for his taking the works of the extension contract 1 B, as appears by a letter of I. K. Brunel to the plaintiff, dated the 3rd of October, 1837. That the Company have

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never apprised the plaintiff of which of his contracts or engagements they pretend he has failed to perform, but withheld from him all information respecting the same, and so precluded him from obviating the causes of dissatisfaction, if such there were. That if the Company have retained or deducted any sums in respect of penalties, they ought to refund or allow the same in account.

That the plaintiff has not become insolvent, or been declared a bankrupt, or otherwise than by the acts and defaults of the Company, prevented from, or delayed in proceeding with, and completing the works comprised in contracts 1 B, 2 B, and extension contract 1 B. That although the plaintiff has incurred heavy debts and liabilities, to the payment of which he is at present subject, yet he has, in fact, been compelled thereto in consequence of the Company not having paid to him the amount of payments he was entitled to in respect of the works done by him, thereby obliging him to purchase and obtain on credit materials and machinery, tools, and implements which he could have purchased for ready money had such full amount been paid to him. That all debts and liabilities to which the plaintiff is subject have been incurred in relation to the said contracts and works, and that when he undertook the same he was possessed of a clear capital of 30,000*l.* and upwards, which has been wholly expended thereon, and that the monies expended by the plaintiff thereon have exceeded by 100,000*l.* the sums he has received from the Company. That the amount owing to the plaintiff from the Company is much more than sufficient for the payment of all his debts and liabilities. That although a committee of the plaintiff's creditors have interposed in the communications with the Company, yet the same was wholly with the design of aiding the plaintiff in obtaining payment of the monies due to him, and they are anxious to facilitate the works, and neither has the fact of the existence of such creditors, nor any steps taken by them, tended to prevent or delay the

Progress of the works, or otherwise to justify the proceedings of the Company. That the Company and their agents, when they proposed that the plaintiff should undertake the extension works, well knew that he was in debt, but in no wise considered it to be a reason for not engaging him thereon. That there was nothing in the conduct or circumstances of the plaintiff to justify the notice of the 22nd June, 1838, or in taking possession of the works, plant, and machinery. That the plaintiff has duly proceeded with the works with the utmost expedition, and in a manner that ought to have been satisfactory to the Company and their engineers, with the exception of such parts of the work as were delayed by the causes aforesaid, and such parts as have been taken by the Company out of the plaintiff's hands,

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That if such notice was justifiable, yet the same was insufficient for founding thereon the ulterior proceedings of the Company, inasmuch as such notice was in such general terms as to preclude the plaintiff from complying with its requisitions. That it was the duty of the Company and their engineer to communicate to the plaintiff precisely and particularly what were the works which they required him to proceed with, and to allow him a period of seven days for so proceeding before they were entitled to assume to themselves the possession and further prosecution of the works. That the plaintiff was [as the Company well knew] ignorant of, and desirous to ascertain and remove, the grounds of complaint, if any there were, but the Company refused to give him any information thereon.

That I. K. Brunel has not come to any decision in respect of the said matters, or, if he has, then he has done so in the absence of the plaintiff, and without affording him any opportunity of explanation, and the plaintiff ought not to be concluded or held bound by any such decision. That if the construction of the contracts be that contended for by the Company, the provisions of the same are oppressive and

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inequitable. That, in truth, the Company have not taken possession of the works, and the plant, machinery, and materials thereon, in consequence of any default or delay, or with the real intention of promoting the completion of the works, [which are, in fact, in a state of great forwardness], but in consequence of the plaintiff having pressed for an account, and for payment of the balance due to him, which it is not convenient for the Company to pay, and to avoid such payment, and convert the property of the plaintiff on the works to their own use. That, under such circumstances, all the penal clauses contained in these contracts have been, or ought, in equity, to be considered as having been waived, abandoned, or become inoperative. That, in such contracts, it is impossible to prevent delays and difficulties beyond those foreseen and expressly provided for, and it is wholly unprecedented to enforce the penalties according to the strict letter of the contract, or to make use of the same other than as a protection against wilful abuse and misconduct on the part of the contractor.

That a large balance is due to the plaintiff on account of the works, and the Company have taken possession of property belonging to the plaintiff of great value, and which cost upwards of 70,000*l*. That if the contracts enable the Company to take possession and appropriate such property and balance under the circumstances aforesaid, then the plaintiff is entitled, in equity, to be released from such contracts on the ground, amongst others, of the same being a surprise upon him, inasmuch as, that, had he been aware of the penal consequences of the contracts, he never would have signed them, and he, in fact, signed them without legal advice ; and, although aware of their contents, he always expected that the provisions thereof would be acted upon in a fair and liberal manner, and that the highly penal clauses would only be resorted to as a means of just protection against any wilful neglect on his part. That, at all events, the works in extension contract 1 B, and the plant

and materials thereon, are not comprised in the penal clauses, and the Company are not justified in taking possession thereof. That, in the notice of the 23rd June last, no complaint was made in respect of the extension contract. That, since the notice of the 2nd of July last, the plaintiff has been actively engaged in taking the necessary measures for obtaining relief, but that, on account of the voluminous and involved nature of the case, much time has elapsed before he could be fully advised on the subject; but having ascertained that, on the 14th of July, the Company had not commenced the prosecution of the works of which they had taken possession, and having received no answer to his letter of the 3rd of July, he, on that day, wrote to Mr. Osler as follows :—[The letter contained an offer to proceed with the works, and to attend to all reasonable directions from the Company, or their engineers, requiring to be reinstated in his property, or otherwise giving notice of legal proceedings]. That no answer has been returned thereto.

That neither of the mortgage deeds contains any trusts or powers which can entitle the Company to take possession of the plant and materials; but, on the contrary, it is expressly stipulated thereby, that the plaintiff should have the possession and use of the plant and materials to enable him to complete the contracts. That the Company have not, in fact, taken or affected to take possession thereof under the mortgage deeds, but have assumed such right and powers under the contracts. That, as to such parts of the plant and materials as are on the works under the extension contract, the Company could not take possession of them, they not being comprised in the mortgages. That even if the Company are empowered by the mortgage deeds to take possession of the plant and materials, yet, by availing themselves of such powers, they have, by their own acts, put it out of the power of the plaintiff to proceed with the completion of the works, and, on that ground, they are precluded from insisting on any penalties and forfeitures against

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the plaintiff. That, if the Company is permitted to retain such possession, it will cause irreparable injury to the plaintiff. That, if the works in the contracts 1 B and 2 B, instead of being completed by the plaintiff, are in any manner varied or altered, it will be impossible properly to measure or value the quantity of work already performed by the plaintiff, or to ascertain what he is entitled to be paid in respect thereof.

That the plant and materials taken possession of are not only of large value in themselves, but, from the particular positions in which they are now placed, are of much more value than they otherwise would be, since they are now placed in positions for carrying through the plans and operations of the plaintiff upon scientific principles, and, if the Company are permitted to retain the possession thereof, there will be great probability of their altering the present position and management, and, in case of the plaintiff resuming the contracts, he will be subjected to a serious loss of time, and to a heavy expense in replacing the same. That part of the machinery taken possession of requires much care and attention in the use thereof, and if used by persons not thoroughly understanding the management thereof, will be rapidly worn out and destroyed, to the serious loss and injury of the plaintiff. That if the Company shall be permitted to retain possession thereof, the same will be blended with other articles of a like description, brought and placed on the ground by the Company, and it will be impossible to separate and distinguish those belonging to the plaintiff from those belonging to the Company; and, in fact, the Company have marked and stamped on the various articles belonging to the plaintiff the letters G. W. R. C. [being the marks and letters by which they designate their own property].

That the Company sometimes pretend, that notwithstanding they have deprived the plaintiff of the means of carrying on the works under the contracts 1 B and 2 B, and

the extension contract l B, yet that they shall hold him liable to complete the same, and also the works on the Reading line, whilst at other times they insist, that although the contracts are separate, yet that they are entitled to connect the same, and to compel the plaintiff to withdraw from the railway line, and to take from the Reading line, and from the plaintiff, the possession of the works, plant, and materials, by reason of the untruly alleged defaults of the plaintiff in respect of the other contracts. That the plaintiff is perfectly willing to perform or abandon the contracts, upon the terms of being paid the monies justly due to him. [After the usual charge as to books and papers], the bill charged, that J. Cordy, R. Ranger, and G. Ranger, have, or are alleged to have an interest in the suit, in respect of their being co-obligors with the plaintiff in the bonds, and they were alleged by the other defendants, the Company, to be necessary parties to the suit, but they decline to act as co-plaintiffs. The bill prayed, that the defendants, the Great Western Railway Company, may be decreed to elect whether they will permit the plaintiff to continue and complete the several and respective works, which on the 2nd of July, 1838, he was in a course of completing, but which now remain incomplete; or whether they will discharge the plaintiff from the further execution thereof, the plaintiff being willing and offering to accept and abide by either alternative, on being paid the amount justly due to him on the footing of the contracts and agreements subsisting between the Company and the plaintiff; or otherwise, on such terms as the court shall think fit to direct, and that, in case the Company shall elect to permit the plaintiff to continue and complete the works, then they may be directed to reinstate the plaintiff in the possession of such works, and of the plant, engines, machinery, tools, implements, and materials thereon, of which they have taken possession, and to pay to the plaintiff such amount or balance as upon a just account to be taken as hereinafter prayed, shall be

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found to be justly due and payable to him under the contracts or otherwise, in respect of the contract works, and the extra additional, and altered, and extension works, after deducting all monies paid to him, or for his use, or by his direction, and all monies which the Company may be justly entitled to deduct or retain by way of reserve fund, or under their mortgage deeds, or otherwise, during the progress of the works; and that all proper and requisite accounts may be taken, under the direction of the court, as between the plaintiff and the Company, for the purpose of ascertaining such balance, and in order thereto, that all proper and requisite directions may be given for ascertaining the quantities of the contract works respectively done by the plaintiff, and the prices which ought to be paid for the same, and the proportion of the sums specified in the respective contracts, which have become payable and have been paid in respect thereof, and for ascertaining the quantities, admeasurements, and values of the extra additional altered and extension works, and the compensations and allowances to which the plaintiff has from time to time become and is entitled in respect of the alterations, deviations, and additions to and in the works from time to time made, and other the matters aforesaid; and that in such accounts the Company may be decreed to refund or allow on account all such monies (if any) as they shall be found to have deducted, or retained, or withheld from the plaintiff, as, or for, or in the nature of penalties under the contracts; and that the principle and footing on which the plaintiff is entitled to have such account taken, and such admeasurement, valuations, compensations, and allowances made under these contracts, or otherwise in respect of the works, may be ascertained and declared by the court; and in case the Company shall elect and determine to discharge the plaintiff from the contracts and works, and from the further prosecution thereof, then, that the plaintiff may be wholly and completely exonerated and discharged of and from all future liability

to see to the execution or completion thereof, and from all responsibility thenceforth to arise and accrue in respect of the same; and that, thereupon, all accounts between the plaintiff and the Company, in relation to the contracts and works, or such of them from which the plaintiff shall be discharged, may be finally taken, wound up, and settled under the direction of the court; and that all such, or the like directions, as aforesaid, and all proper and requisite directions may be given for that purpose, and for ascertaining the amount or balance justly due to the plaintiff, on the footing and settlement of such account, and that the Company may be decreed to pay to the plaintiff the balance which shall be found justly due to the plaintiff on such account, after deducting and retaining thereout the amounts due to them on the footing of their mortgage securities, the plaintiff on his part offering, in case a balance shall be found due from him, to pay the same, and that, thereupon, the Company may be decreed to deliver up to the plaintiff all the plant, machinery, engines, tools, implements, and materials of which they have taken possession, as aforesaid, and also to permit him to remove and take from off the other parts of the works, all his plant, engines, machinery, tools, implements, and materials of which they have not as yet taken possession, or otherwise to account with the plaintiff for, and pay to him, the full value of the same respectively, and, that it may, if necessary, be declared, that the plaintiff has not incurred or become subject to, and is entitled in equity to be relieved from any penalties or forfeitures under the contracts; and that the Company, their engineers, workmen, servants, and agents may, as well perpetually as in the meantime, be restrained by the injunction of this honourable court, from retaining or withholding from the plaintiff, the possession of the plant, engines, machinery, tools, implements and materials of or belonging to the plaintiff, of which they have taken possession, as aforesaid, and from doing, or procuring, or permitting to be

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done, any act, matter, or thing whereby, or by means whereof, the plaintiff can or may be prevented or impeded from the doing and completing the aforesaid works, or any of them; and that the Company may be restrained from removing from off the said ground and works comprised in the contracts No. 1 B and No. 2 B, and in the extension contract designated as extension contract No. 1 B, the plant, engines, machinery, tools, implements, and materials thereon, of which they have taken possession, as aforesaid, or any part or parts thereof, and from using the same, or any parts or part thereof, and from altering the localities and positions thereof, or of any part thereof, and from doing any damage or injury thereto, or to any parts or part thereof, and also from taking possession of, and also, in like manner, from using, altering, and doing any damage or injury to the plant, engines, machinery, tools, implements, and materials, brought and placed by the plaintiff upon, and now being in and upon that portion of the line of railway, called the Reading line, upon which the plaintiff has been and is employed, as aforesaid, or any parts or part thereof; and, that the Company may, in like manner, be restrained by the injunction of the court, from continuing and carrying on the respective works comprised in the respective contracts No. 1 B, and No. 2 B, and the extension contract No. 1 B, and on such portion of the line of railway, called the Reading line, as aforesaid, or any parts or part thereof, with or by means of the plaintiff's plant, engines, machinery, tools, implements, and materials, or any parts thereof, or otherwise, so as to alter the state and condition of the works, before the amount or respective amounts due to the plaintiff in respect of the aforesaid matters have been ascertained, and for further relief.

To this bill the Company demurred, for that the plaintiff hath not, by his said bill, made such a case as entitles him in a court of equity to any discovery or relief from or against these defendants, touching the matters contained in the said bill, or any of such matters, and for further cause

of demurrer, these defendants shew that the said bill is exhibited against these defendants, and the other defendants thereto, in respect of several and distinct matters, which ought not to have been joined together in one bill, wherefore &c.

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Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stevens*, for the demurrer.—The contracts in this case contain provisions which are familiar to the Court, from being similar to those which occurred in a late case before this Court, relating to a Roman Catholic chapel at Hereford (a). In that case, the contracting party had submitted to refer every dispute to the decision of the architect; and the only difference between the two cases is, that in this, the superintending engineer of the Company, instead of an architect, is to be the absolute judge of the fitness of the work, and of the payments to be made, from time to time, on certificates under his hand. Nothing can be more absolute than the powers given by these provisions; they are, nevertheless, generally adopted into contracts of this description; and, though it may excite some wonder how parties will willingly submit themselves to them, yet, in practice, they have not been found to be ordinarily attended with inconvenience.

The relief prayed turns upon the right of the Company to make their election which course they will take, no offer being made to redeem the mortgages, nor any question of account raised, except on the imaginary right to compel the Company to make an election in the way prayed.

The bill cannot be sustained on account of the multifarious matters it has strung together. The sureties, in the bonds given by the plaintiff to the Company, could not have been joined as co-plaintiffs, (and, indeed, the bill alleges that they decline to do so), inasmuch as the bill would have been open to a demurrer if they had been joined in that

(a) The case alluded to is a case of *Heather v. Postlethwaite*, which was before the Vice-Chancellor on the 10th of March, 1838.

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character as co-plaintiffs, and the liability of a bill so framed to a demurrer would arise from the unconnected nature of the subject-matter of it. The objection, however, to the frame of this bill remains the same whether these persons are made defendants or not. It is charged by the bill, that the defendants, the Company, insist, that, though the contracts are unconnected, they have a right to connect them together.

This is the only excuse for attempting to join them, with the exception of the mortgage, and the mortgage does not alter the case, unless the bill contains an offer to redeem; the bill does not claim a right, or make an offer to redeem, but merely submits to pay contingently, in the event of one of the modes of election being taken. On the ground, therefore, that the plaintiff has mixed up all the matters relating to these contracts in one bill, and that bill does not ask for leave to redeem, or, if seeking to redeem, does not confine itself to redemption, it cannot be sustained.

Another ground of objection to this bill, is the want of any distinct statement of its nature and purposes: *Kemp v. Pryor* (a), *Kay v. Marshall* (b), *Attorney-General v. The Mayor of Norwich* (c).

Moreover, the bill, without praying a specific performance, sets forth a number of multifarious matters, by which it seeks to induce the Court to assume an equity, arising out of the whole of the circumstances, which may give to the plaintiff a right to put the Company to their election, and, in default, compel them to give a specific performance.

With reference to the nature of the engagements into which the plaintiff has entered, they are found to exist in all trades and professions; the conditions being absolute, the Company have taken possession as on a breach of the contract; and, if they have taken a wrongful possession, an action of trover or ejectment is the proper proceeding. The

(a) 7 Ves. 237. (b) 2 Myl. & Cr. 382. (c) 2 Myl. & Cr. 426.

bill contains no charge of fraud, or, at the utmost, only one passage, in which the plaintiff says, he has been unfairly dealt with; and it was decided, in the Hereford chapel case, that, to induce this Court to interfere, a charge of actual fraud must be made. Such a charge is not found in this bill; and this, therefore, is not a case in which any relief can be granted by a court of equity.

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Mr. Serjt. *Wilde*, Mr. *Wakefield*, and Mr. *Girdlestone*, for the bill.—With regard to the question, whether the plaintiff might not have obtained full relief at law upon these contracts, it is plain that the case is so surrounded with difficulties, that, even if the plaintiff's remedy did not fall within the peculiar jurisdiction of a court of equity, he never would be able to prove his case in a court of law. In a court of law the time stipulated would admit of no explanation; under the contracts the terms are compulsory, and, on the orders given by the engineer, it would be impossible for the plaintiff to recover at law; the plaintiff does not know whether some of the contracts are or are not under the seal of the corporation; and yet, with all these difficulties combined, with the pertinacious silence of the Company, who have fenced themselves round with the act of Parliament, and refused to afford the plaintiff any explanation or information, it is said, that he must take his case to a court of law, for that nowhere else can he obtain a remedy. Courts of equity are supposed to have originated to provide a remedy for these very difficulties in proceedings at common law, otherwise the law would have extended its practice to meet such a case as this. The plaintiff says, "I have entered into contracts with the Company; under those contracts they have had the benefit of all the works executed by me; they are considerably indebted to me; and I have mortgaged some of my property to them; they have, upon untrue allegations, taken possession of a quantity of valuable materials belonging to me, which they desire, at the last

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moment, when I have expended all I possess for their benefit, arbitrarily to avail themselves of; at law I cannot obtain redress; and, therefore, I seek equitable relief! Let the Company either permit me to go on and finish the works, or let me be entirely absolved from the contracts, and let an account be taken of what is due between us." Surely, this is fair and equitable.

The next objection is, on the ground of multifariousness; and the objection is, that the contracts are all separate and distinct, and ought not to be embodied in one bill. But that is not the rule of equity pleading; although contained in different instruments, they all relate to one and the same subject; they are so intimately connected together, that no Court can understand the case, as it really stands between the plaintiff and the Company, unless they are all taken together; the contract is, in fact, one—one deed contains the stipulations which relate to the subject-matter of the others; their general nature is the same, and nothing of variety is to be found in them, save the different character of the work to which each refers. The whole of them together resolve the case, with the mortgage, into a question of account, which can only be taken in a court of equity; and if the Court refuses to do this, on either alternative of the bill, it will amount to a denial of justice.

Mr. Knight Bruce was not called upon to reply.

THE VICE-CHANCELLOR.—I must allow the demurrer for want of equity. I do not think that the objection for multifariousness is well founded; because, although the four contracts are not exactly the same, yet they are all in *pari materiâ*; and it seems to me, that, if the Court had any jurisdiction at all, it can only exercise that jurisdiction with respect to all of them together, especially attending to the circumstances that the parties themselves have in effect, in their dealings upon the contracts, blended them together,

according to the allegation in the bill. But there is one thing that occurs to me, and that is this, that the suit is unfortunately so constructed, as that, if other parties besides the Company make the objection, it can be hardly met without producing that very objection to the bill which, when complained of by the Company, the plaintiff admitted was a valid one. It is impossible not to see that G. Ranger has nothing to do with the first two contracts; and, if he objects for multifariousness, the plaintiff must then strike him off the record, and, if he is struck off, and then the defendants bring forward their old objection, all the parties are not here; and then you will have to struggle between Scylla and Charybdis.

With respect to the general point, I cannot but think, that it was the intention of the defendants, that they should have, in a very great degree, an arbitrary power of dismissing their contractor, if they were dissatisfied with him; and I think that the language of that clause, which relates to the notice, proves it, because the language is, "that in case the plaintiff should become insolvent, or be declared a bankrupt, or should from any cause whatsoever, other than any arising from the act of the Company, their engineers, or authorized agents, be prevented from, or delayed in proceeding with, and completing the works, according to this present contract."—Now, there *his* delay is contemplated in the first sentence, to be a delay which shall arise from some cause other than the act of the Company; but, what says the second? "or shall not commence or proceed in the works to the satisfaction of the Company."—It is not said whether that be grounded on *his* acts, or upon their acts, but, generally, that if he shall not commence or proceed with the works to the satisfaction of the Company. Now, if it had been meant to guard the plaintiff against caprice on the part of the Company, whether they would be satisfied or not, how does it happen, that in the second branch of the sentence, there are none

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of those excepted words which you find in the first branch? and, the truth is, as it seems to me, that the parties in framing this clause, were sensible that, if they had allowed it to stand on the spirit in which the first member of the sentence is constructed, they would have taken away from the Company an arbitrary power: they deliberately omit these words, which are found in the first part of the sentence, when they come to frame the second, and therefore put it "or shall not commence or proceed in the works to the satisfaction of the Company." It seems to me this was very reasonable, because the truth is, these works must be finished by a particular time, and it never would do for the Company to enter into bickerings from time to time with the contractor, whether he was carrying on the work in a manner that ought to be satisfactory, all which of necessity would prevent the doing of the work about which the discussion was made; therefore, they have wisely, as it appears to me, and with the full knowledge of the contractor, stipulated for this arbitrary power, "that if he shall not commence or proceed in the works to the satisfaction of the Company, it shall be lawful for them to give a notice, either under seal, or signed by two of the directors, requiring him to enter upon and commence, and regularly proceed with the works." Then it says, that "in case the plaintiff shall for seven days after such notice given or left, make default in commencing, or regularly proceeding with the works, it shall be lawful for the Company to employ any other respectable workman," and so on, and then follow the other things on which the act of forfeiture is made to depend. Now, I cannot but think, that the only true and reasonable mode of construing the latter part of the sentence, is with reference to the first part of the sentence, namely, that if he does not for the seven days go on in commencing and regularly proceeding to the satisfaction of the Company. It would be gross nonsense if it were otherwise, because if so, it would have this effect, that, because the

Company were dissatisfied, they gave him a notice, and then he goes on to their dissatisfaction. But then it is said, the Company must give notice again, so that there would be a perpetual recurrence of notices every seven days, and in the mean time the Company would be under a perpetual state of dissatisfaction with the contractor. Now, that could not have been the meaning of the parties, and my opinion is, that it must have been their intention, that the Company should be at liberty to exercise an arbitrary power to eject the contractor, and the counsel for the plaintiff seem to have been aware that such clauses have been introduced; and, if I recollect right, a case of *Heap v. the Archbishop of Canterbury*, proceeded entirely on the circumstance, that where there were public commissioners for building churches, they provided in their contract that the work should be done to the satisfaction of given individuals, or otherwise there should be no payment, or a restricted payment. There it was argued that it was arbitrary and unjust, but the answer to that was, it is quite impossible for the persons, upon whose behalf the work is executed, themselves to form a fair opinion about it; they know nothing. Then, in order that they may not misapply the money which they have for the purpose of executing the work, they provide, that the person who contracts in the subordinate character of a contractor to do the work, shall do it to the satisfaction of some given individual; then, if he is not satisfied, it is meant that there should be no remedy, and the contractor knows it beforehand; and I cannot but think that in this case the Company meant to reserve, and did reserve to themselves the right of arbitrarily dismissing the contractor, and, although this bill states, that it is done with a view to get hold of his property, and so on; why, that may be true, but, still, if they had a right to dismiss him, they have only exercised the right, and although there may accrue to them by the exercise of the right some consequences which were not originally contemplated, they

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are mere accretions to the exercise of the right. In this case, the plaintiff himself contracted with the Company, that they should have that power. Now, I do not understand, supposing that be not so, how this court can interfere. If the forfeiture is a legal one, then, of course, there can be no redress at law ; and I do not see how a court of equity is to relieve against the forfeiture in respect of this act of the Company, without at the same time providing for the due execution of the contract. Those who ask equity must do equity, and the equity which the plaintiff asks cannot be administered, unless due provision is made for the execution of the contract, and this court will not execute such contracts as those stated in the bill, and the court is, therefore, disabled from giving a reciprocal equity to the defendants, which they would be entitled to in case the plaintiff has the equity which he seeks. If this court cannot relieve the plaintiff, because it could not relieve the defendants, it does not appear to me that there is any portion of the case on which the bill can be sustained. In the first place, this court has no right to put the defendants to any election, whether they will employ the plaintiff or not.

The truth is, their own course of action from time to time is their election, and which they may make from time to time. They cannot employ him unless he concurs, but if they do elect to employ him, and he concurs, then there is no occasion to apply to the court of Chancery, and this court cannot compel the defendants to employ him if they do not choose, especially if they have the arbitrary power of dismissing him.

The equity of the case comes to this, that the defendants have illegally and without warrant seized the plaintiff's pickaxes and wheelbarrows, and so on, and therefore he files his bill. There is no case for account, because there is nothing of mutual payments; all the payments are on one side in respect of labour done, and if any thing be due for labour done more than is paid for, a court of law is the court

in which the quantum of what is due must be ascertained; and, with respect to that, it seems to me, that so long as the works are in progress, it is quite impossible for this court to enter into the question, and, for the reason that I have just assigned. This is, in fact, nothing more than asking for relief for the seizure of goods, for which, as I understand the case, the plaintiff may have a complete remedy at law, and, if he has not a complete remedy at law, it by no means follows that he has a remedy in equity. I think he has not; and I must allow this demurrer.

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The plaintiff appealed to the Lord Chancellor, and the case was argued before his lordship after the sittings following Trinity term had ended.

Mr. Serjt. *Wilde*, Mr. *Wakefield*, and Mr. *Girdlestone*, for the plaintiff.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stevens*, for the Company.

At the conclusion of the arguments, the Lord Chancellor stated that he should defer his judgment, but his lordship made the following observations:—

LORD CHANCELLOR.—As I have been requested to hear this case with a view to the injunction, it may be convenient that I should now express my opinion with reference to that point. The prayer of the bill is singular; but I must regard it as an alternative prayer, and the injunction sought is adapted to the alternative case. The first part of the injunction is applicable to the case of the contracts, supposing them to be carried on, and the plaintiff to be reinstated in the works. If, however, the contract is to proceed, it is obviously of a nature over which this Court cannot have jurisdiction, by way of directing a specific performance; and not having that jurisdiction over the entire contract,

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the Court will not assume it over a particular part of the contract, or interfere with the view of enabling the plaintiff to proceed with his works. If the bill had no other foundation than would arise out of this relief, it would have been open to demurrer. But then comes the alternative prayer for determining the contract; and supposing the plaintiff to be entitled to the relief he asks under this part of the prayer, will any right to the injunction arise as incidental to this equity? The Company, it is alleged, are in possession of the plant and materials, under the mortgage, excepting such parts as are upon the works of the extension contract. If the contract be at an end, this possession of the Company, except upon the extension works, is perfectly legal. If the plaintiff is not entitled to relief in equity, upon the circumstances under these contracts, the Company are then legally in possession of this property under the forfeiture. A material question in the cause must be, whether the Company are in possession under an absolute title or as mortgagees. It may be found that the plaintiff is entitled to have the value of this property accounted for; but it is impossible to interfere and decide this question upon an interlocutory order. In either view, the injunction, so far as it is sought to alter the possession of the property, is wholly out of the question. Is the Court to assume against the defendants, that they are not entitled to the use of this plant and machinery?

Another ground upon which it is urged that the injunction should issue is, that, if the Company are permitted to proceed, the state of the works done by the plaintiff will be altered, and the works themselves confounded with other works. But, as I have said, if the contract is to continue, the Court has no jurisdiction in the case; and, if the contract is determined, the Court cannot restrain the defendants from proceeding with the execution of their own works. The only ground upon which such an interposition is asked for is, that a difficulty may be created in ascertaining to

what extent the plaintiff is entitled to payment or remuneration. I cannot see how the plaintiff can be prejudiced by this means; for if the evidence of his right to payment be destroyed, every possible presumption will be made against the party destroying that evidence. Under no view of the case, therefore, can the Court interfere by way of injunction.

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LORD CHANCELLOR.—This is a demurrer which came before me during the long vacation, and I was induced to hear it, though the sittings had terminated, because it was represented that it was necessary to dispose of the demurrer in order to give the party an opportunity of moving for an injunction; but, upon the discussion of the demurrer, I was so satisfied that the case made by the bill, was one upon which I should not interfere in granting such an injunction as the bill sought, that it did not become material at that moment to dispose of the demurrer. The demurrer, is, first, general; and, secondly, for multifariousness; and, as far as the latter is concerned, I see no ground for it whatsoever, and, therefore, I dispose of it without further observation, the Great Western Railway Company being interested in the whole of the case made, and there being no part of the case in which they are not interested.

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It remains then to be considered, whether a general demurrer for want of equity will prevail, and it cannot prevail, if, attending to the statement made by the bill, the plaintiff is entitled to any part of the relief prayed. The bill is singular in its frame, for it prays that the defendants may elect, whether they will restore the plaintiff to the situation in which he was when they took possession of the works, so as to enable him to complete the works which he has contracted to perform; or, if they do not choose to do so, that they may elect to consider the contracts at an end; but, upon either alternative, it prays that the accounts which subsist between the plaintiff and defendants may be

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taken. It is not necessary to go into any very detailed statement of the case made in the bill, because if any part of it is capable of sustaining an equity, the demurrer cannot prevail. But, for the purpose of explaining the view I take of the case made on the bill, it is sufficient to state, that the plaintiff alleges, that he entered into contracts to do certain works on the railway, and that it was part of the provisions of those contracts, that every fortnight the engineer of the Company should ascertain the quantity of the work done, or rather, the value of the work done, according to certain stipulated rates of charge. That the plaintiff, as contractor, should be paid four-twentieths of the amount of the work so ascertained by the engineer, that is, he was to receive 80% out of every 100%, and the 20% unpaid, was to remain in the hands of the Company until it accumulated to 4,000%, and, upon attaining that sum, the engineer certifying that the work was properly done, he was to be paid the whole of what had become due. Then certain provisions were introduced into the contracts, imposing very severe penalties, and giving very great powers to the Railway Company, and amongst others, this, "That if the engineer should not be satisfied with the mode in which the work was conducted, or the progress which was made in it, the Company should be at liberty to give notice to the contractor to prosecute the works; that if he did not, within seven days, prosecute the works, then they were to be at liberty to enter upon the works so in progress, and, upon that taking place, that not only all the plant, machinery, and utensils, employed by the contractor, should be forfeited to the Company, but the plaintiff should also forfeit what might remain unpaid for the work previously done;" that is to say, that the money actually paid, should be considered as in full satisfaction of the work actually done up to that time. Now, if the engineer had done that which the contract provides, if he had provided for the payment to the contractor of the eighty per cent. of all the

work done every fortnight, the forfeiture would have operated upon the twenty per cent. alone. But the case made by the bill is this; that that was not done, and that, in fact, the engineer favouring the Company, and acting oppressively towards the contractor, did not estimate the works done so as to give the contractor the eighty per cent., and, according to the statement in the bill, which is all I have to look to at present, there would be a very much larger sum due to the contractor than the twenty per cent. due upon the previous estimate; but the penalty, as stated in the bill, is endeavoured to be enforced upon all that is due, that is, not only to exclude the contractor from the twenty per cent. unpaid, but from a very large proportion of the eighty per cent. which he ought to have received. Now, this can only be ascertained by an investigation of the work done, and the mode in which the engineer has estimated the works, so as to ascertain what sum the contractor was to receive. But this is not the whole case stated; because, independent of the works carried on under these several contracts, three, I think, in writing, there were other contracts not in writing. There was the extension contract, which was a carrying on of the line contracted for, but for which no contract existed in writing; but it was to be carried on upon a certain stipulated amount of prices. Upon that, the bill alleges payments have been made, but that very large sums remain unpaid. The bill states, that, upon the whole, upwards of 30,000*l.* is due to the plaintiff on the works actually completed by him; so that, if the Company are right in doing what they have done, namely, in entering under the provisions in the contracts, as for a forfeiture, they are in possession of a large sum of money which, even in that view of the case, would be coming to the plaintiff, the amount only to be ascertained by a minute examination of the works done, and of the mode in which the payments have been calculated from time to time by the engineer, an investi-

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gation which, it is obvious, can only take place under the superintendence of a court of equity, and impossible to be made in a court of law. The case, however, goes beyond that—for it states, that, in the progress of the works, the plaintiff being pressed for money to carry on the works, applied to the Company to advance him sums of money upon loan: that they consented so to do; and that three several advances of money were made, which were secured upon the property of the contractor, namely, the plant, utensils, and tools employed in carrying on the works, by a mortgage of his interest in that property, and of the twenty per cent. remaining unpaid of what was due to him for work previously done. That, however, applied only to the plant, implements, and tools, under the written contracts; it did not apply to the plant, implements, and tools employed in the contract not in writing; but the Company have taken possession of the whole, and they claim under the penalty. They say, it is all forfeited. The bill, therefore, contains a statement which, if true, would shew that the Company have no title under that clause of forfeiture, because the forfeiture can only be enforced in the event of the contractor disregarding the monition after seven days. The bill (whether true or not, is perfectly immaterial for the present purpose,) alleges, that within the seven days, taking up the very words of the contract, the plaintiff had put himself in a situation which, if true, would prevent the Company from exercising their power of forfeiture. It contains that allegation which, if true, would shew they had no title under that clause of forfeiture, and, if so, they are in possession of large property, stated in the bill to amount to 70,000*l.*, upon which they had a lien, undoubtedly for the purpose of repaying the sums advanced to the contractor. It is also stated, that the engineer said, that he would, in making the certificates, consider what the state of the amount upon all the different contracts was; not confining himself to any particular contract. The result

would be, therefore, according to the allegations of the bill, that the defendants have illegally possessed themselves of property, because it is part of the contract, as to the loan, that it should remain in the hands of the contractor for the purpose of enabling him to go on with his works. According to the case, therefore, they have, without authority, got into the actual possession of property under a mortgage to them, but which they have contracted to leave in the hands of the plaintiff; and an unsettled account of the nature I have stated, remains to be settled, in order that the plaintiff may obtain payment of that which is due to him, and redeem the property, which, according to his statement, is his property. At this moment, it is impossible to say, this is not a case in which, if made out, this court would be bound to administer some relief; and, upon the question of the demurrer, the only question is, whether any part of the case stated, would entitle him to a decree? It appears to me, quite impossible, supposing all these allegations to be true, that this bill could be dismissed at the hearing; and being of that opinion, the demurrer cannot stand. The demurrer will be over-ruled, and the order of the Vice-Chancellor, allowing the demurrer, discharged upon the usual terms, and the deposit returned.

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Between Sir THOMAS STANLEY MASSEY
 STANLEY, - - - - - Plaintiff,
 and
 THE CHESTER and BIRKENHEAD RAILWAY
 COMPANY, - - - - - Defendants.

An agreement to purchase certain lands of the plaintiff had been entered into by the promoters of an intended Railway Company, and thereupon the plaintiff withdrew his opposition to their proposed bill in Parliament. The promoters of a competing Railway Company, who also proposed to pass through the plaintiff's lands, and to which he was likewise opposed, petitioned Parliament for a bill, and under the sanction of a Committee of the House of Commons, the merits of the respective lines were referred to arbitration.

The two Companies agreed that the successful should adopt the engagements of the rejected Company, and to this agreement the plaintiff, by his agent, assented.

The award of the arbitrators being in favour of the second Company, their bill passed:—*Held*, by the Vice-Chancellor, and by the Lord Chancellor affirming his Honor's decision, that the plaintiff having, on the faith of the agreement between the two Companies, offered no opposition to the passing of the act, the second Company, as the condition of entering upon the lands of the plaintiff, were bound by the terms of the agreement between the plaintiff and the first Company.

THE bill stated, that certain persons were proposing to form a railroad to be called the “ Birkenhead and Chester Railway,” and that the intended line of railway would, according to the plans deposited with the clerk of the peace for the county of Chester, pass through certain estates of the plaintiff, so as to be injurious and destructive to his property, and that the plaintiff was therefore very much opposed thereto.

That W. S. Miller was the solicitor employed by the intended Company, and he, in that capacity, made overtures to the plaintiff; and in the result the plaintiff agreed to give his consent to the intended railway passing through his estates, on certain terms to be agreed upon between the agent of the plaintiff and the intended Company. That the Company appointed the said W. S. Miller to act as their agent in the adjustment of such terms, and the plaintiff appointed R. Blundell to act for him, and such respective agents met on the 17th of January, 1837, and they then signed a memorandum to the following effect:—

It was agreed upon by R. Blundell, as the agent of the plaintiff, on the one part, and W. S. Miller, on behalf of the proposed Railway Company, on the other part, that the Company should pay to the plaintiff the sum

of 20,000*l.*, by specified instalments, for the purchase of so much of the plaintiff's lands as was proposed to be taken, including compensation for all damages, both to the plaintiff and his tenants, provided the act proposed to be introduced into Parliament for forming the said Company should pass into law; and thereupon the plaintiff was to convey to the Company the land requisite for the railway, as delineated and marked out in the plan deposited with the clerk of the peace; and that, in the formation of the railway, such conveniences as the plaintiff should require for communicating with the land on each side, and for hunting purposes, should be made; and the agreement concluded with the usual arbitration clause, in case the parties differed.

That a rival Company, to be called the "Chester and Birkenhead Railway Company," for making a railway between the same points, (Chester and Birkenhead), was then forming, and the proposed line of such railway also passed through the plaintiff's estates, and to this proposed line the plaintiff also dissented. That J. Mallaby was the solicitor for the second Company, and two bills were, in the Session of 1837, introduced into the House of Commons by the respective promoters of the two lines, and were referred by that House to the same committee; and a proposal having been made to refer it to Lord Sandon and Mr. Wilson Patten, to determine which of the two lines should be adopted, it was assented to by the respective promoters of the two bills, and an agreement to that effect was entered upon the minutes of the proceedings of the committee. That, before the committee adjourned for the day, an agreement was signed by the respective solicitors of the two bills, and which was to the following effect (*inter alia*):—"It is the basis of this agreement, that the shareholders of the rejected line are to be at liberty, if they think proper, to take shares in the other line; and further, the adopted line is to take the engagements entered into with the landowners, by the rejected line. Signed, 18th April, 1837, J. Mallaby, for

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the Chester and Birkenhead Railway Company; W. S. Miller, S. Britain, jun., solicitors to the Birkenhead and Chester Railway." That such agreement so signed was approved of and adopted by the promoters of the two bills respectively, and by the agent of the plaintiff, and such approval was testified by the agreement being signed as follows:—"Approved, R. Bryan, chairman, C. Bentham;" "Approved, S. Britain;" "Approved, G. J. Chambers;" "Approved, R. Blundell." The said R. Bryan and C. Bentham being two of the members of the committee acting for the promoters of the Chester and Birkenhead Railway Bill; and the said G. J. Chambers and S. Britain, acting for the promoters of the Birkenhead and Chester Railway Bill; and the said R. Blundell being the agent of the plaintiff.

That Mr. Stephenson was the engineer employed for the Chester and Birkenhead line, and Mr. Walker for the Birkenhead and Chester. That the referees, Lord Sandon and Mr. Patten, made their award, which was filed among the proceedings of the committee, whereby, after minutely detailing the merits and demerits of the respective lines, they determined that Mr. Stephenson's line should be the line selected; and they then, in their award, stated as follows:—"Having no authority from the landowners, we have not felt ourselves at liberty to go in detail into the question of injuries apprehended by them from the respective lines:—they will, of course, remain in full possession of the right of being heard before the committee, and stating their objection to either line." Signed, "Sandon, J. Wilson Patten." That, upon such award, the Chester and Birkenhead Railway Bill was passed; the other bill being withdrawn.

That the plaintiff, relying on the agreement between W. S. Miller and R. Blundell, so as aforesaid agreed to be adopted by the successful Company, and not doubting but that the same would be faithfully adhered to, assented to the bill, and took no part in the further opposition that was

made thereto in the two Houses of Parliament; and the Chester and Birkenhead Bill passed the House of Lords, and received the royal assent on the 12th July, 1837; and by it it was enacted, that certain persons therein named, of whom the said R. Bryan and C. Bentham were two, should form a Company, and should be a corporate body, by the name of the "Chester and Birkenhead Railway Company," and by that name might sue and be sued.

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That, under the terms of the agreement so made and adopted as aforesaid, an instalment of 5,000*l.* became due to the plaintiff on the 12th October, 1837; and having been demanded by Messrs. Humberstone, the plaintiff's solicitors, from J. Mallaby, as the solicitor of the Company, and on whom they served a copy of the agreement of January, 1837, they, on the 15th February, 1838, received, in answer thereto, a letter offering, on the part of the Company, to refer the question of the legal liability of the Company, under the circumstances, to some barrister; but that, if the plaintiff's solicitors preferred extending the reference to ascertaining the value to be paid to the plaintiff, the Company had no objection so to extend it; and the letter added a suggestion, that, inasmuch as the directors intended to deal liberally with the plaintiff, it would be as well to defer entering into a reference until they had ascertained what they might think it right to offer independently of any prior questions. That Messrs. Humberstone returned for answer to such letter, "That there was nothing to refer; but that the plaintiff was entitled to an honest performance of the engagements the Company took upon themselves in the agreement of reference; and they required the instalment to be paid at an early day." That, subsequently, on the 7th April, 1838, a more formal demand for payment of the first instalment was made, and to this no answer had been given.

The bill charged, that the defendants had, by the terms of the agreement under which the reference to Lord Sandon and Mr. Wilson Patten was made, adopted the agreement

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of the 17th January, 1837, entered into by W. S. Miller and R. Blundell, and had taken upon themselves, under it, all the liabilities of the promoters of the other line of railway, who, under it, would have been bound to pay to the plaintiff,—and, therefore, that the defendants had become bound to pay to the plaintiff the sum of 20,000*l.*, at the several times, and by the instalments specified in the agreement of the 17th January. That W. S. Miller, when the discussion for the reference took place before the committee of the House of Commons, distinctly informed J. Mallaby, in the presence and hearing of R. Blundell, of the existence of the agreement between him and R. Blundell, and although he did not name the precise sum, he informed J. Mallaby, and two of the persons acting as the committee for the Chester and Birkenhead Railway, that such sum was more than 15,000*l.*, but would not exceed 20,000*l.*; and that it was after such express notice, that the agreement of reference was signed.

That, by the line of road proposed to be formed by the Birkenhead and Chester Railway, only fourteen and a half statute acres of the plaintiff's land would have been taken, whereas, by the defendant's line, sixteen and three-quarters acres are to be taken; and the rejected line was purposely laid down so as to avoid certain fox coverts and preserves on the plaintiff's estate, whereas the present line goes through and destroys two fox coverts and preserves, and, in other respects, does much greater injury to the plaintiff's estate than the rejected line would have done.

The bill prayed, that it may be decreed that the agreement of the 17th January, 'hereinbefore set forth, is binding upon the defendants, and ought to be performed by them; and that under it they are bound to pay to the plaintiff, at the time and in manner therein mentioned, the sum of 20,000*l.*; and that they may be decreed specifically to perform the said agreement; and may be decreed forthwith to pay to the plaintiff the sum of 5,000*l.*; and to pay to the plaintiff the sum of 10,000*l.* on the 13th October

then next, being twelve months from the day when the first 5,000*l.* ought to have been paid; and to pay to the plaintiff the further sum of 5,000*l.* on the 13th October, 1839; and also to pay to the plaintiff the costs of this suit; the plaintiff hereby offering in all respects to perform and execute the said agreement on his part; and that the defendants, their workmen, servants, and agents, may be restrained by the injunction of this honourable court, from entering into or upon the plaintiff's said estates and lands, or any part or parts thereof, until they shall have paid to the plaintiff the full sum of 5,000*l.*; and if the defendants shall not pay to the plaintiff the sum of 10,000*l.* on or before the 13th of October then next, then that they &c. may in like manner be restrained, &c., and from proceeding with the formation of the railway in any manner over or through the plaintiff's said estate and lands, after the 13th of October next, until the defendants shall have paid to the plaintiff the full sum of 10,000*l.*; and if the defendants shall not pay to the plaintiff the further sum of 5,000*l.* on or before the 13th of October, 1839, [Prayer for an injunction until payment, similar to that with respect to the former instalments], and for further relief.

To this bill the defendants put in a demurrer for want of equity.

Mr. *Jacob* and Mr. *Walker* for the demurrer.—This bill attempts to carry the principle laid down by the Lord Chancellor, in *Edwards v. Grand Junction Railway* (a), to a further extent than that case warrants. It is difficult to collect from the judgment of the Lord Chancellor in that case, what was the precise principle which led the court to the decision that the existing Company were bound by the contract.

The plaintiff seeks a literal performance of the agreement of January, 1837, and he must therefore take it upon the

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literal construction of all the terms of that agreement; but by that agreement the contract was not to take effect, should the proposed act not pass into a law; it has not passed into law, how then can the plaintiff seek to have the agreement performed? Moreover, by the agreement in question, if literally performed, the Company is bound to take the identical lands specified in the plan deposited with the clerk of the peace, referred to in that agreement, lands through which their line is not intended to and cannot pass. The court will be decreeing, not a specific performance with a variation, but a specific performance of a variation. It will, in effect, be holding that a contract to sell Whiteacre, is a contract to sell Blackacre. A demurrer will hold to this bill, for want of parties. The plaintiff is bound to bring all the persons with whom he made the contract before the court; and the question is to be considered, how far a Company which never came into existence can transfer the benefit of a contract, the very origin and validity of which depended on the incorporation of that Company, to an entirely new and subsequently incorporated Company. When a voluntary Joint Stock Company enter into an agreement to be binding on the Company when incorporated, the persons subsequently incorporated must be the same persons who made the agreement, to render it binding.

There is no mutuality in this agreement between the parties. By the line proposed and agreed to between Miller and Blundell, fourteen and a half acres only of the plaintiff's estates were to be taken, and certain fox coverts were to be avoided. The new line will require sixteen and three-quarters acres, and will destroy two fox coverts. Would the plaintiff be bound under the agreement to acquiesce in our taking the difference in acreage, and going through these preserves? Might he not say, "I contracted to sell fourteen and a half acres, not sixteen and three-quarters; I expressly stipulated that my coverts were not to be interfered with?"

A plan of the line now established, was, at the time of the agreement, deposited with the clerk of the peace, and the meaning of the agreement was, that we are to pay the plaintiff not only in respect of the land we take, but also in respect of compensation to the plaintiff and his tenants, on the basis of the agreement between Miller and Blundell. A jury can ascertain this.

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Mr. *K. Bruce* and Mr. *Lowndes*, in support of the bill, were not called upon by the Court.

The VICE-CHANCELLOR.—This case is as simple as possible. Certain persons enter into an agreement to form a railway, to be called the Birkenhead and Chester Railway, and a Mr. Miller is appointed their agent for that purpose. The proposed line was to pass through the estates of the plaintiff, and was objected to by him; however, an arrangement is entered into by Miller, on the part of the intended Company, and a Mr. Blundell, as the agent of the plaintiff, the immediate effect of which was, that, on certain specified terms, the plaintiff should withdraw his opposition to the bill; that the Company should pay the purchase-money by stated instalments; and should not enter on the lands until, at least, the first instalment was paid. Other persons projected a railway, to be called the Chester and Birkenhead Railway, between the same termini, but by another line; and it was shewn by their plan, that their line was also intended to pass through other parts of the plaintiff's estate.

The Committee of the House of Commons, to whom the merits of the two bills was submitted, referred it to Lord Sandon and Mr. Wilson Patten, to adjudge and determine which of the two rival lines should be adopted; and the arbitrators made an award, by which the line projected by the Chester and Birkenhead Company was the line selected; and it was properly stated in the award, "that the arbitrators, having no authority from the landowners, had not felt themselves at liberty to go in detail into the question of

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injuries apprehended by them from the respective lines; but that such landowners would, of course, remain in full possession of the right of being heard before the committee, and stating their objections to either line." That award having been confirmed, the Chester and Birkenhead Railway Bill passed into law.

While this arrangement between the Chester and Birkenhead and the Birkenhead and Chester Railway Companies was under discussion, an agreement was entered into, by the respective agents and promoters of the two bills, by which they first of all determined, that the merits of the two lines should be decided as I have mentioned; and also, "That, as the basis of the agreement, the shareholders of the adopted line were to take the engagements entered into with the landowners of the rejected line;" and there is no difficulty in understanding what the parties meant. Every thing which could bind the Birkenhead and Chester Company should bind the Chester and Birkenhead, as between the two Companies themselves. But, as if that alone was not sufficient, in this instance, the agreement between Miller and Blundell was expressly adopted by the Chester and Birkenhead Company; and the agreement between the two Companies was signed as follows:—"Approved, S. Bryan, chairman, C. Bentham;" "Approved, S. Britain;" "Approved, G. J. Chambers;" "Approved, R. Blundell;" and it is observable, that the signatures include those of two of the persons who, with other persons, were the persons constituting the Company for making the Chester and Birkenhead Railway.

The bill then states, that the plaintiff, relying on the agreement between Miller and Blundell, so agreed to be adopted, and not doubting but that the same would be faithfully adhered to, assented to the proposed bill, and took no part in the further opposition that was made thereto; and so it appears, that a consideration has been actually given by the plaintiff to the persons actually forming the

present Company ; namely, by his making no opposition to the further progress of their bill.

It was, previously, quite plain what parts of the plaintiff's estates either line would affect, and there is nothing in the slight difference of acreage in the two lines ; namely, by one fourteen and a half, by the other sixteen and three-quarters, being to be taken ; or that, according to the line projected by the first-mentioned railway, certain fox coverts would be preserved. Those circumstances only shew, if any thing, the honesty with which the plaintiff acted. It was nothing more, in fact, than saying, that, instead of the expenses of a new agreement between the plaintiff and the Chester and Birkenhead Railway, the agreement between the plaintiff and the Birkenhead and Chester, should be the agreement between the plaintiff and the Chester and Birkenhead.

The Chester and Birkenhead Company are, therefore, as much bound to pay the 20,000*l.*, for the purpose of taking possession of the plaintiff's lands, as the Birkenhead and Chester would have been had they taken possession.

The plaintiff asks, that the agreement may be performed ; that the defendants may pay the purchase-mones by the specified instalments ; and, in case of default, for an injunction ; and I think he is entitled to this relief. The demurrer must, therefore, be overruled, with costs.

I cannot think that, in any view of the case, it was necessary to make the promoters of the other Railway Company parties to this bill.

The defendants appealed from his Honor's judgment.

Mr. Jacob, *Mr. Wigram*, and *Mr. Walker*, for the appeal.

The LORD CHANCELLOR, without calling upon *Mr. K. Bruce* and *Mr. Lowndes*, affirmed the decree of the Vice-Chancellor, with costs.

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Between JOHN GREENHALGH, - - - Plaintiff,
and*December 5th
and 6th.*

THE MANCHESTER and BIRMINGHAM RAILWAY

COMPANY, - - - Defendants.

Two lines of Railway were projected, the first designed to pass through the centre of the plaintiff's lands, the second through only a small portion at one extremity.

The projectors of the first line agreed to purchase a certain portion of the plaintiff's land at a fixed price, and there-

upon he agreed to assent to their proposed act, and he was accordingly returned as an assenting party. The same agreement provided, that by giving notice to the plaintiff the projectors might vacate the agreement if they did not carry out their act. The projectors of the second line declined entering into a similar agreement with the plaintiff, and to their proposed act they alleged he declared himself and was returned neutral, but the plaintiff alleged that he dissented therefrom in writing.

By an arrangement between the two sets of projectors, made at the recommendation of a Committee of the House of Commons, an act was passed for incorporating the projectors of the two lines into one Company for making a railway, which adopted, as far as the lands of the plaintiff were affected, the line designed by the second set of projectors.

The plaintiff alleged that in the lists of land-owners accompanying the consolidated bill, he was returned as assenting, and the Company alleged that he was returned as neutral.

The projectors of the first line gave a notice to the plaintiff determining the agreement.

The Consolidated Company having given a notice to the plaintiff for treating for the portion of his land required for the railway, the plaintiff filed his bill, insisting that some of the projectors of the first line being incorporated in the Company, the Company could not take any portion of his land except upon the terms of the agreement.

Affidavits were filed on the part of the plaintiff to shew that he had always insisted on such right against the Company; and on the part of the Company to shew conduct of the plaintiff inconsistent with the intention of insisting on such right. On a motion to dissolve an injunction obtained ex parte:—*Held*, by the Vice-Chancellor, that inasmuch as the line of railway sanctioned by Parliament materially differed in extent and direction from that contemplated by the projectors of the first line, and the act applied for by them did not in fact pass, and inasmuch also as the projectors of that line had determined the agreement by the notice, the plaintiff was not entitled to enforce the contract against the Consolidated Company, and his Honor therefore dissolved the injunction.

Held, on appeal, by the Lord Chancellor, that whatever might be the equity of the plaintiff's case with regard to the enforcement of his contract against the Company, the plaintiff, after being as he stated well aware of his alleged right, had by his conduct in leading the Company to believe that he had no intention to claim a performance of the agreement against them, deprived himself of any right to the injunction.

of Parliament to incorporate themselves for such purpose: That G. Peel, E. Swannick, and J. Armstrong, were three of the provisional committee, and Messrs. Slater and Heelis were the solicitors of the intended Company.

That, according to the line laid down in the plan or section, deposited with the clerk of the parish, in which the lands of the plaintiff are situate, part of his lands would have been required in the formation of the railway, and Messrs. Slater and Heelis in the month of December, 1836, applied to the plaintiff to assent to the formation of the proposed line, and a treaty was opened for the purchase of the plaintiff's lands by the Company, and for his assent to their intended railway.

That, after some negotiation, Messrs. Slater and Heelis addressed a letter to Mr. G. Holt, who was authorized to act as the agent of the plaintiff and other land-owners on the proposed line, and thereby offered certain terms for the purchase of the plaintiff's lands, stipulating also, that, in the event of those terms being accepted, an assent must be given by the plaintiff to the proposed railway.

That an agreement was made, dated the 14th day of February, 1837, between the plaintiff, of the one part, and the said G. Peel, E. Swannick, and J. Armstrong, on behalf of themselves and the several other persons, subscribers for shares in a capital to be raised for making and maintaining the intended railway, and which subscribers were intended to be incorporated as a Company by an act of Parliament, to be applied for and obtained in the then present or some subsequent session of Parliament, of the other part; to the following effect, the plaintiff agreed to give his assent to the passing of the act, and further agreed, that if the act should be obtained, he, his heirs, executors, and administrators, would, at or before the expiration of six calendar months from the passing thereof, in consideration of the payment of a sum as the price of the buildings then erected on the said plots of land, calculated as therein

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mentioned, and of a further sum equal in amount to twenty-three years' purchase, on a rent calculated after the rate of ten-pence for every superficial square yard, minus the amount of twenty-three years' purchase on any original chief rent thereon, sell and convey to the Company the fee simple and inheritance of and in a certain plot of land, situate in the township of Ardwick, therein particularly described, amounting in the whole to 7,040 square yards, and would, within a reasonable time after the passing of the act, produce the several deeds relating to his title to the plot of land. And G. Peel, E. Swannick, and J. Armstrong, on behalf of themselves and the subscribers, agreed that, before any work should be commenced on the land, and within six calendar months after the passing of the act, and on the execution of the conveyance or assignment of the land and buildings, they would pay the stipulated purchase-monies, and would also, in the meantime until the purchase should be completed, pay unto the plaintiff, by half-yearly payments, a yearly rent of ten-pence for every superficial square yard of the land agreed to be sold, minus the chief rents payable thereon, the first of such half-yearly payments of rent to be made on the 29th of September then next. And it was thereby provided, that, in case the act should not pass during the then present session of Parliament, it should be lawful for the said subscribers to vacate the agreement, and every clause, matter, and thing therein contained, on giving to the plaintiff three calendar months' notice for that purpose in writing, and paying the rent in respect of the land up to the expiration of such notice, which notice was to end on one of the usual quarter days, and should not be given before the 24th of June then next, and, in the event of any other Company obtaining an act, for the purposes of which it might become necessary or desirable to sell the said land and buildings to such Company, before the South Union Company should obtain their act, or, in the event of the purchase not being com-

pleted within two years from the date thereof, the plaintiff should be at liberty to vacate the agreement, upon giving three months' notice. And in the agreement was contained a clause for arbitration, in case of any difference arising relative to the value of the buildings then erected on the plot of land, and the agreement was duly signed by G. Peel, E. Swannick, and J. Armstrong, and by the plaintiff.

That the plaintiff thereupon assented to the intended railway, and his name was returned to Parliament as an assenting party thereto, and he was reckoned as one in the number of assents to the proposed railway.

That, in the year 1836, certain other persons associated themselves together, and became subscribers to an undertaking for the formation of a railway from Manchester to Rickerscote, in the county of Stafford, to be called the Manchester, Cheshire, and Staffordshire Railway, and they proposed to apply for an act of Parliament to incorporate themselves into a Company for that purpose. That, according to their plan deposited with the clerk of the peace, the last-mentioned line was intended to pass over the plaintiff's land, and applications were made to him by Messrs. Wheeler, of Manchester, who were the solicitors of the last named Company, for his assent; but the plaintiff dissented in writing thereto, and his name was not returned to Parliament as assenting, nor included in the number of assents to the last-mentioned proposed railway.

That a bill was introduced into Parliament in the session of 1837, for making the proposed railway, to be called the Manchester South Union Railway; and, in the same session of Parliament, another bill was introduced for making the railway, to be called the Manchester, Cheshire, and Staffordshire Railway, and both bills were referred to one Committee in the House of Commons. That, after some investigation of the merits of the two proposed lines, the Committee of the House of Commons recommended to the subscribers and promoters of the two proposed railways,

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that they should amalgamate, and the committee adjourned their sittings, in order to enable the parties to make the necessary arrangements.

That an agreement in writing, signed by the respective parties thereto, and dated prior to the 15th of May, 1837, was entered into between certain persons, duly authorized to act for the respective promoters of the two proposed lines of railway, for the purpose of effecting the amalgamation of the two intended Companies, and in such agreement was contained the following clause:—"That in every case where either Company shall have entered into any contracts or engagements with land-owners, whose property may be affected by whichever of the two projected lines may be adopted, though in a somewhat different mode, and the Company projecting the accepted line shall not [though the other Company may] have made contracts with individual land-owners, the contracts so entered into by the Company proposing the rejected line, shall be adopted by the United Company, having regard to the different modes in which the property may be affected by the adopted line."

That, on the 13th of May, 1837, Messrs. Slater and Heelis, acting as solicitors of the amalgamated Company, addressed to the then solicitors of the plaintiff, a letter, dated the 13th of May, 1837, as follows:—

"We send you on the other side, an extract from the agreement entered into between the two Companies, which will afford you all the information in our power, as to the effect of the change of line on the contracts made by the South Union Company with your clients. When the act is obtained for the Manchester and Birmingham Railway, [the title of the new Company], a general meeting will take place; after which the agents of the new Company will be in a situation to confer fully with you on the subject, at present, however, you will see, that neither we, nor our committee, can afford you any further assistance than as appears by the agreement." And on the other side of the

letter was copied the clause in the agreement last hereinbefore set forth.

That, after the agreement of May, 1837, had been made, and, on the application of the Chairman of the Committee of the House of Commons, leave was given by the House to consolidate the two bills, and on the 22nd of May, 1837, the Committee reported to the House, that they had consolidated the two bills into one, and had adopted in one part the line proposed by the Manchester, Cheshire, and Staffordshire Railway, and in another part the line proposed by the Manchester South Union Railway; and they recommended to the House to sanction such arrangement. That, in an appendix to the report of the Committee, the number of assents, dissents, and neuters, on the proposed line so formed out of the amalgamation of the two bills was given, and in the number of assents, the name of the plaintiff was included by reason of his assent, given under the agreement of the 14th February, 1837. That the line of railway proposed to be taken by the Manchester, Cheshire, and Staffordshire Railway, was the line adopted by the Committee of the House of Commons, so far as either of the lines of railway affected the lands of the plaintiff.

That, after the receipt of the letter of the 13th of May, 1837, the solicitors of the plaintiff wrote a letter to Messrs. Slater and Heelis, dated the 20th of May, 1837, as follows:—

“Our clients are not able to form a correct opinion from the extract furnished by you, of your agreement with the Cheshire Junction Company, as to how far their contracts with your committee will be affected, they have therefore desired us to request you to furnish us with an entire copy of the agreement between the two Companies.”

That, to the last-mentioned letter, Messrs. Slater and Heelis, on the same day, replied as follows:—

“As concerned only for a portion of the now United Company, we do not feel justified in complying with your

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request, to be furnished with a copy of the agreement entered into between the two Companies, nor can the general stipulations concern your clients. In the present state of the business we must decline further explanations in reference to our arrangements."

That the plaintiff relied upon the clause contained in the agreement of May, 1837, as securing the completion of the contract of the 14th of February, 1837, and did not, as he otherwise would have done, take any steps for dissenting from, or opposing the line of railway adopted in the bill recommended to the House of Commons. That the bill so formed by the consolidation of the two proposed bills passed both Houses of Parliament, and on the 30th of June, 1837, received the royal assent; and is intitled, "An Act for making a Railway from Manchester, to join the Grand Junction Railway, in the parish of Chebsey, in the county of Stafford, to be called the Manchester and Birmingham Railway, with certain Branches therefrom." That it was thereby enacted, that thirty-seven persons therein named, and all other subscribers to the intended South Union Railway Company, and the intended Manchester, Cheshire, and Staffordshire Railway Company, or who should afterwards subscribe to the undertaking by the act authorized, and their successors, should be, and they thereby were, united into a Company for making and maintaining the railway, and should be a body corporate, by the name and style of "The Manchester and Birmingham Railway Company," and by that name should sue and be sued, with power and authority to purchase and hold lands for the use of the undertaking.

That, of the thirty-seven persons named in the act of Parliament, twenty-two [including the said G. Peel, E. Swannick, and J. Armstrong,] were named in the bill introduced into Parliament for making the railway to be called the Manchester South Union Railway, and fourteen were named in the bill for making the Manchester,

Cheshire, and Staffordshire Railway. That the persons, who, at the passing of the act, were the shareholders in the Company thereby created, were the same persons who had been subscribers to the two proposed Companies. [The bill then stated the usual powers given by these acts to enter, survey, and take lands for the purposes of the railway; and for the impannelling of juries to assess the value of such lands, and the damages, where the owners, occupiers, or persons interested therein should refuse, or be incapable to treat for the purchase thereof (*a*)].

That, after the passing of the act of Parliament, and on the 11th of July, 1837, the solicitors of the plaintiff wrote to Messrs. Slater and Heelis on the subject of the agreement of the 14th of February, 1837, and, in answer thereto, received a letter, dated the 12th of July, 1837, as follows:—

“So soon as the directors are appointed, your letter of yesterday’s date will be submitted to them; in the meantime there are no parties who can take any steps on behalf of the Company in connexion with the business.”

That, in reply to some further applications, Mr. T. Wheeler, the solicitor to the Company, wrote a letter to the plaintiff’s solicitors, dated the 18th August, 1837, as follows:—

“Messrs. Slater and Heelis have forwarded to me this morning the copy of a letter sent by you to them, and being a transcript of a communication from your office, on the 11th of July last, in reference to certain contracts made by the late South Union Company with the several parties named in your letter; you wish to have an answer to that communication; it is impossible that I can yet give you any answer; but, as soon as I can, I will take care to do so; and it will be my anxious wish to prevent delay in putting you into possession of the intentions of the directors in respect to such contracts.”

That, on the 28th of August, 1837, Messrs. Slater and

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Heelis wrote to the plaintiff's solicitors a letter, as follows:—

“ We had thought our previous replies, both verbal and written, to your communications, that, not being solicitors for the Company, we could only forward your communications to the directors, which we have done, were sufficiently direct as to the conduct of our clients in the matter. The contracts were entered into for the benefit of a railway not sanctioned by Parliament; therefore, except as to cases where rents are in that event payable to your clients for a limited time, we do not admit any continued liability on the part of our clients. We have, it is true, endeavoured to induce, and we hope with some success, the present Company to adopt such of the contracts as apply to lands similarly affected by both lines of railway; and you will, no doubt, shortly hear from the clerk of the Company, or from the chairman, what the views of the Company are in this respect; but, so far as the members of the South Union Company are concerned, the contracts are, we submit, at an end, or will be put an end to by the notices, subject to such payments as, by the terms of the contract, may be payable for rent.”

That, on the 7th of October, 1837, the plaintiff received a notice, signed by Mr. W. Garnett, as follows:—

“ To Mr. Greenhalgh.—I, the undersigned, being the chairman of the provisional committee appointed for superintending and conducting an application to Parliament, during the last session, for an act to authorize the construction of a railway from Manchester to join the proposed Derby and Birmingham Railway, at or near Tamworth, intended to have been called ‘ The Manchester South Union Railway,’ but which act was not passed during such session, for and on behalf of myself and the several other persons, subscribers for shares in a capital to be raised for making and maintaining the said last-mentioned railway, do hereby, in pursuance of the power given to me in and by a certain agreement in writing, bearing date the 14th day of Fe-

bruary, 1836, and made between you, the said John Greenhalgh, of the one part, and G. Peel, E. Swannick, and J. Armstrong, three of the said provisional committee, of the other part, give you notice, that the said subscribers will vacate the said agreement, and every clause, matter, and thing therein contained, and that the same shall, to all intents and purposes, be deemed and considered as vacated, and, on behalf of myself and the said several other persons, subscribers as aforesaid, I do, therefore, hereby declare the same to be vacated and annulled as on the 25th day of December now next ensuing, up to which day the rent payable to you, by virtue of the said agreement, will be duly paid or tendered. Signed, W. GARNETT, the 18th day of September, 1837."

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That, on the 5th of December, 1837, the plaintiff received a letter of that date, as follows :—

" Manchester and Birmingham Railway Offices,
23, Bond Street, Manchester.

" Sir,—The board of directors have requested me, as their chairman, to inform you, and to request you to apprise any of your tenants whom it may concern, that the Company's engineers, in the performance of their duties, and in pursuance of the provisions of the act of Parliament, are about to enter on the land belonging or reputed to belong to you, for the purpose of staking out the line, and taking the levels and surveys, by which the quantity of ground required by the Company must be determined; the engineers are instructed, on all occasions, to consult the convenience of the parties so far as is compatible with the due execution of the work. I am requested to add, that, as soon as the engineer in chief shall have reported to the directors the portion of your property which will be wanted for the construction of the railway, they are desirous of treating for the purchase, upon the principle which may appear best adapted to insure a prompt and equitable adjustment of the respective interests of the proprietor and the Company. Signed, R. BARBOUR, chairman of the board of directors."

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That, subsequently to the receipt of the letter of the 5th of December, 1837, an application was made to the plaintiff, to state what claims he made upon the Company in respect of such part of his land as they required; and, thereupon, a communication took place between Mr. Cooper, as the plaintiff's solicitor, and the solicitor of the Company, on the subject of the plaintiff's lands,—the plaintiff, by his solicitor, contending that the contract of the 14th of February, 1837, was binding on the Company, and refusing to treat with the Company on any other basis, and threatening to take proceedings to enforce the contract; and, on the 26th of June last, Mr. T. Wheeler wrote and sent to the solicitor of the plaintiff a letter, as follows:—"I am sorry to say, that it will be my duty to resist any proceedings which you may take on behalf of Mr. Greenhalgh, with a view to set up the agreement purporting to have been made by him with certain members of the committee of the late South Union Company."

That, on the 8th of August last, Mr. T. Wheeler, in answer to a letter from the plaintiff's solicitor, wrote to him as follows:—

"I have received your letter, and have laid it before the acting directors, who appoint half-past two o'clock this day, at their office, for an interview with Mr. Greenhalgh; there is no special arrangement between you and myself as to Mr. Greenhalgh's right to enforce the contract referred to in your first letter to me, but there is a distinct understanding that, in any conversation between your client and the directors, there is no admission by us of the contract, or waiver by you of it, but that the communication is privileged and private."

That, on the 6th of August, 1838, the plaintiff was served with a notice in writing, as follows:—[The bill set out the notice, which stated, that, under the provisions of the act, the Company intended to take the lands of the plaintiff, described and delineated in the schedule and plan annexed, and required the plaintiff to treat with them for

the sale of such land, and also for any compensation he might claim in respect thereof; and that, in case of his refusal to do so for the space of ten days, a jury would be impannelled to assess the value of the same, and also such compensation. And to the notice and schedule was annexed a plan, shewing how much and what part of the plaintiff's land the Company proposed to take].

That the plaintiff, being advised that he was well entitled to have the contract of the 14th of February, 1837, performed by the Company, the same being binding on them, and that the Company are bound to purchase the whole of the plaintiff's lands mentioned in the contract, and to pay the price by the contract fixed for the purchase of such lands, and are not entitled to take such portion only of the plaintiff's lands as they may require for the purposes of the railway, or to have the price to be paid for the same fixed by a jury, has requested them to perform the contract of the 14th of February, 1837, the plaintiff having in part performed the same on his part, and being ready, in all respects, to complete the performance.

The bill charged, that the Manchester and Birmingham Railway Company consists of the same persons as were proprietors of the Manchester South Union Railway, and that the Company are, by the contract of May, 1837, bound to perform all the contracts entered into by the promoters of the Manchester South Union Railway, and are bound to perform the contract of the 14th of February, 1837; that the lands of the plaintiff now required by the Company are part of the same lands which form the subject of the agreement of the 14th of February, 1837, but the Company do not require or intend to take the whole thereof; that the assent of the plaintiff to the bill under which the Company were incorporated was given on the faith of the Company being bound to perform the agreement of the 14th of February, 1837; and that the intention of Messrs. Slater and Heelis, in sending to the solicitors of the plaintiff the extract from the agreement of May, 1837, was to shew to

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the plaintiff and his solicitors, that the agreement of May, 1837, would be binding on the Company when incorporated, and would be performed by them.

The bill prayed, that it might be declared that the agreement of the 14th of February, 1837, is binding upon the defendants, the Company, and ought to be performed by them; and that they might be decreed specifically to perform the same, and to pay to the plaintiff the sum or sums of money which, by the said agreement, the said G. Peel, E. Swannick, and J. Armstrong agreed to pay to the plaintiff, and that the amount thereof might be ascertained by and under the direction of this Court; the plaintiff being ready and willing, and offering specifically to perform the said agreement, and to convey to the defendants, or as they should direct, all the lands and hereditaments mentioned and comprised in the agreement of the 14th of February, 1837; and that the defendants might be restrained, by the injunction of this Court, from causing a jury to be summoned to assess and give a verdict for the sum or sums of money to be paid by the Company for the purchase of the hereditaments, and also to ascertain and assess the compensation and satisfaction to be made by the said Company for any damages which should or might be sustained by the plaintiff, for or by reason of the severing or dividing the same from other lands whereof, wherein, or whereto the plaintiff should be seised, possessed, or entitled, and also for and on account of any damage, loss, or inconvenience whatsoever which should or might accrue, or be sustained by the plaintiff, by reason of the execution of any of the powers of the act in respect of the said hereditaments; and from and in any manner proceeding to enforce against the plaintiff, and his lands and hereditaments, the powers given to them by the act of Parliament; and that the defendants, their servants, and agents might also be restrained, by the injunction of this Court, from entering into or upon the said lands and hereditaments of plaintiff, in the township of Ardwick, except for the purpose of survey-

ing and taking levels, until they should have paid to the plaintiff the sum and sums of money which, by the said agreement of the 14th of February, 1837, the said G. Peel, E. Swannick, and J. Armstrong agreed to pay to the plaintiff. And for all necessary and proper directions. And for further relief.

The plaintiff filed an affidavit, verifying the statements of the bill; and, on the 14th August, 1838, obtained an *ex parte* injunction at the private residence of the Vice-Chancellor. On the 8th of November, 1838, the defendants gave notice of a motion to dissolve the injunction.

In opposition to the statement of the plaintiff, with regard to the use of his assent in obtaining the act, J. B. Bowker deposed, that, prior to the application to Parliament by the Manchester, Cheshire, and Staffordshire Company, deponent called upon the plaintiff, to request his assent to their proposed bill, when the plaintiff directed the deponent to return him as neuter, which he did, and proved him as a neutral before the Committee on petitions for private bills in the House of Commons.

J. Lowe, surveyor to the Company, deposed, that, in a return made to the Committee of the House of Commons, after the consolidation of the two bills, of the number of assenting, dissenting, and neutral owners of property affected by the railway, thereby sanctioned, the plaintiff was not included in the number of assents, by reason of his assent given under the agreement of the 14th February, 1837, but was returned in the list, proved in Committee on the consolidated bill, as neutral in respect thereof.

The plaintiff, by a second affidavit, deposed, that, in his first affidavit, he referred to an appendix to the report of the Committee on the consolidation of the two bills. That when he made that affidavit, he believed, and still believes, that his name was included in the number of assents given to the consolidated line: that, by his affidavit, he referred to that appendix, and not to any return made to such Com-

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mittee, of which return he is entirely ignorant: that, since making that affidavit, he has searched among the proceedings of the Committee, recorded in the Journal Office of the House of Commons, to see the return mentioned in the affidavit of Lowe, but has been unable to learn any thing of such alleged return: that he has also endeavoured to ascertain, at that office, if there had been any mistake made in the return of the plaintiff's name, as an assenting party: that, upon such search, he found the word "assent" written opposite to his name, in the proceedings kept relative to the South Union Railway Company, and he was informed, by a person in such office, and apparently having the custody of such proceedings, that, inasmuch as deponent's name appeared there as an assenting party, it would be reckoned in the number of assents mentioned in the said appendix, and that he was not aware of any minute or memorandum which there was in the office, that would express any thing contrary to such assent. By a second affidavit, J. Lowe deposed, that, after the consolidation of the two bills, he was instructed to prepare, for the Committee of the House of Commons, a table of the assenting, dissenting, and neutral land-owners on that part of the Manchester and Birmingham line which was adopted from the Manchester, Cheshire, and Staffordshire Company: that, in that list, the plaintiff was returned as neutral: that, on the Manchester and Birmingham Railway Bill being carried through the House of Lords, the plaintiff's name was returned as neutral; and that the assent given by the plaintiff to the South Union Railway, was in no way whatever used or employed before Parliament for the purpose of the Manchester and Birmingham Railway.

T. Wheeler, the solicitor to the Company, deposed, that, in the month of January, 1837, he, as the solicitor of the Manchester, Cheshire, and Staffordshire Company, had a communication with the plaintiff, and that the plaintiff then read or stated to him the offer he had made for the sale of

his land to the South Union Company, and said, "he was willing to make the same arrangement with both Companies;" whereupon deponent stated, "that it was quite impossible to agree to any such principle as that stated by the plaintiff; for that the two lines might affect the same property quite differently, and that an arrangement, which might be fair as to the one line, might not be so as to the other;" and that deponent refused, on behalf of the Manchester, Cheshire, and Staffordshire Company, to make any arrangement for any part of the plaintiff's land which would not actually be required for their railway.

J. B. Bowker deposed, that, on the 24th of May, 1838, the plaintiff called at the office of Mr. Wheeler, and was referred to deponent, and the plaintiff then inquired what part of his land would be required for the Manchester and Birmingham Railway, and said, that he was very anxious to know the quantity, as it was the season for making bricks, and he was prevented from letting his land for that purpose, not knowing what quantity would be required: that, on the 26th of May, the plaintiff called again, when he stated, that he had an agreement with the South Union Company, which he wished to know if the Manchester and Birmingham Company would perform: that deponent referred him to the directors of the latter Company, and afterwards heard Mr. Lyon, one of such directors, say to the plaintiff, "that the Company had nothing to do with any agreement between the plaintiff and the South Union Company:" that, on the 1st of June, the plaintiff called again, to inquire the quantity of his land which would be required by the Company, and the deponent then shewed him a plan of the land intended to be taken, and informed him, that the quantity required would be 1,352 square yards.

G. W. Buck, one of the engineers in chief to the Company, deposed, that the plaintiff called at his office, and asked to see a plan of the railway as staked out through his property,

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and which was shewn to him : that he complained that the line as laid down would very much injure the land on the east side thereof, which the Company would not take : that the plaintiff then asked, whether the Company would require any land from him in addition to that necessary for the line, as shewn upon the plan, for, that the South Union Company were to have taken more land, to which the deponent replied, “ that the Company would not want any land except what was necessary for the line of railway.”

J. Lowe further deposed, that, in the month of January, 1838, the plaintiff called on him, and producing a lithographed plan of his lands, informed the deponent, that his object in calling was to have the line of railway marked on the plan, in order to see in what manner his property would be affected, and particularly what quantity of his land was intended to be taken : that deponent shewed him the precise course of the intended line : that in March, 1838, the plaintiff again called on the deponent on the same subject, and that the plaintiff on no occasion mentioned or referred to the existence of any contract with the South Union Company : that deponent on the last occasion observed, “ that the present line did little or no injury to his property,” to which the plaintiff replied, “ Yes, you stop my principal street.”

The plaintiff, in answer to these affidavits, deposed, that he applied to Lowe to mark upon the plan the line of railway, in order that he might see how it would affect his adjoining land, not included in the contract, and that he might be able to explain the same to persons desirous of purchasing such adjoining lands.

F. Sharp deposed, that, on the 23rd of September, 1837, he served a notice at the residence of the plaintiff, similar to the notice set out in the plaintiff's bill and first affidavit, and therein stated to have been served on the 7th of October, 1837.

The plaintiff deposed, as to the fact of such service, that

he received a letter from Mr. Slater, dated the 4th of October, 1837, as follows:—

“ Sir,—Finding from your letter of the 25th ult., which I only received yesterday, and from my interview with you yesterday, that you had not seen the notice, served at your house on the 23rd ult., on behalf of the South Union Committee, I beg to hand you herewith a copy of such notice, in order that you may not remain ignorant of its contents.

“ W. SLATER.”

The plaintiff deposed, that the directors of the Company must have been aware that he never had consented to waive his right to the performance of the contract: that one of their clerks, named Foss, called on the plaintiff in January, 1838, and offered to pay a sum of money for rent due under the agreement, and left the following receipt for the plaintiff to sign.

“ Received from the Manchester South Union Company the sum of £——, being the quarter’s rent due to me on the 25th of December last, under my contract with the members of the committee, and which discharges all my claims upon that Company in respect of rent or otherwise, under such contract:” That plaintiff refused to sign such receipt, as he should thereby sign away his right to enforce the contract.

R. Foss deposed, that he was clerk to the South Union Company; but not to the Manchester and Birmingham Company: that the objection of the plaintiff to sign the above receipt, referred, as deponent believes, to an alleged insufficient service of the notice upon the plaintiff: that the plaintiff did not object to sign such receipt, on the ground that he should sign away his right to enforce the contract, or deny the right of the South Union Company to determine by notice the said contract.

T. Wilson deposed, that he is in the employ of the plaintiff: that he recollected the letter sent to the plaintiff by Messrs. Slater and Heelis on the 7th of October, 1837, to

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which was annexed the notice signed by Mr. W. Garnett: that he recollected on the same day being desired by the plaintiff to deliver a letter from him to Mr. Slater, and that he delivered the same on the 7th of October, 1837: that the following is a copy thereof:—

“ October 7th, 1837.

“ Sir,—The notice left to-day with my shopman I have just perused, and am obliged to you by your avowed design of putting me in possession of its contents: as, however, I had seen Mr. Hayley’s, which is very similar, I am not benefitted by it; and I take the liberty to say, that I object to it, principally for two reasons, which, at first view, your own mind will admit as valid; first, because if your ideas be correct, that you can vacate the agreement, the term of contract cannot expire before March next, as your notice was not delivered until to-day, being eight days after the quarter-day; but, secondly, and mainly, because you are not at liberty, as you and your clients well know, to annul the agreement, as the act has been obtained, and the respective shareholders, as recent advertisements attest, are each and all amenable in law to the united acts of the amalgamated Company, or the prior respective acts of each Company. (Signed) “ J. GREENHALGH.”

The plaintiff, by a third affidavit, deposed to the writing, and sending this letter, and that he had altogether forgotten his having written and sent such letter, until he was reminded of the fact by the discovery of a copy thereof, on the 21st of November, 1838.

R. Barbour, the Chairman of the Company, deposed to receiving from the plaintiff, on the 23rd day of January, 1838, a letter (with a plan annexed) as follows:—

“ Sir,—Being applied to by a wealthy gentleman for the whole of my land in Ardwick, as marked blue on the accompanying plan, I respectfully presume to request that you, as the chairman of the Manchester and Birmingham Railway Company, will kindly answer the subjoined

queries:—1st, does the united Company design to maintain the contract entered into between me and the South Union Company, or, am I perfectly free from it, by the notice sent? 2ndly, if the contract is not binding, please to say, as nearly as you can, what quantity of my land will be required: 3dly, as certain portions of my property are available by the Company, shall I subject myself to any legal difficulty by a disposal of the entire, if the application as above should be urged? If an immediate reply cannot conveniently be given, by informing the bearer when, at the earliest, you will furnish one, will greatly oblige, &c.

“J. GREENHALGH.”

G. W. Buck further deposed, that, in January, 1838, he directed that the line of railway, as designed through the plaintiff's lands, should be staked out, and borings to be made: that the designs for the works for the line of railway were commenced soon after the completion of the staking out, and were completed in May, 1838, and on the 20th of May, advertisements were inserted in all the public newspapers, announcing the letting of the contracts for the construction of the same line.—And J. Lowe, and W. H. Jenkins, assistant engineer, deposed, that in January, 1838, they marked out the line of the railway through the plaintiff's lands, and put stakes across it in the line: that the plaintiff frequently watched them doing so, and never objected. The plaintiff deposed, that he does not recollect observing the staking out and boring, mentioned in the above affidavits; but, that had he done so, he should have taken no notice, as he considered that the Company would have been entitled to do so under the contract.

G. W. Buck further deposed, that, in laying out the line of railway, he might have avoided the property of the plaintiff, and would have done so, if he had been aware of any difficulty in taking the line in the particular mode in which the same is now concluded to be taken: that the present line of railway could not be constructed under the

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act, in the direction or line in which the South Union Railway was intended to pass.

P. Higgins deposed, that, in the beginning of the year 1838, the plaintiff informed him that he wished to let his land for making bricks: that he had had a contract with one of the Railway Companies, and that they were then paying him rent, but that their time would be up in the land in March next: that the plaintiff said, he suspected the Railway Company would only want a corner of his land, but he did not appear to know positively where the precise line would come: that deponent said, if the Company took that corner, it would be no use to him, as there was no clay upon the plaintiff's land, except in that corner: that deponent afterwards understood from the plaintiff, that he could not let the land for brick-making, because the line of railway would occupy that corner.

S. Taylor, on behalf of the defendants, deposed, that, on 14th of December, he was instructed by plaintiffs to prepare a plan of his land in Ardwick, which he did: that the reference to such plan described the whole of such lands as to be sold for building purposes, and stated, that the land on sale was coloured blue: that the plan was lithographed, and that one hundred of such plans were struck off, and circulated by the plaintiff.

The plaintiff deposed, that, in addition to the land contained in the contract of the 14th of February, 1837, he is the owner of a large adjoining plot of land: that, at the time when he applied to Taylor to make the said plan, he reminded Taylor of the contract with the South Union Company: that he did not consider himself at liberty to offer that part of his land for sale, and that such part ought to be distinguished: that Taylor replied, "that he had better set out the whole on the plan, as his doing so could make no difference, and it was possible that the Company might not carry out their act; in which case, the plaintiff must be at the expense of a fresh plan:" that, considering

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that the merely laying out the land upon a plan in manner above mentioned could not, and would not, make any difference in respect of his contract, he desired Taylor to make out the plan in the way suggested: that, after the plan was made out, several persons applied to him to treat for the land; and that he invariably informed those persons, that he was not at liberty to offer for sale such part as was under contract with the Railway Company.

P. Duckers deposed, that, in May, 1838, he applied to the plaintiff for a portion of his land, who informed him, that the portion he wanted was under contract to the South Union Company. J. Phillipson and S. Garside severally deposed to communications to the same effect in January, 1838: and the former deposed, that, on his asking the plaintiff, "why the land was all coloured blue?" the plaintiff said, "in order to save expense in case the Company should not carry out their act." J. Bamber deposed to communications, in December, 1837, to the same effect as deposed to by Duckers. T. Wilson deposed, that he was in the employ of the plaintiff, and that, in the month of January, 1838, a Mr. Mather called at the shop of the plaintiff, and inquired the price of the whole of the plaintiff's lands in Ardwick, that the plaintiff replied, that he was not at liberty to sell the whole, as part was sold to the South Union Railway, and shewed Mather the part sold on the map.

S. Taylor, by a second affidavit, deposed, that the plaintiff stated that he wanted a plan prepared to shew the whole of his lands; and the deponent denied that he ever stated, "that it was possible that the Company might not carry out their act."

W. Mycock deposed, that he remembers hearing the plaintiff state, either at the end of January, or the beginning of February, 1838, that he had made an agreement with the South Union Company for a large quantity of his land, and that the Manchester and Birmingham Company refused to perform the agreement.

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J. Chambers deposed, that the plaintiff had repeatedly stated to the same effect to him in the months of February, March, and April.

Mr. *Jacob*, Mr. *Koe*, and Mr. *Loftus Lowndes*, in support of the motion to dissolve the injunction.

Mr. *Knight Bruce* and Mr. *Sharpe* contra.

[The arguments are introduced in a subsequent part of the report, when the motion was before the Lord Chancellor.]

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VICE-CHANCELLOR.—In this case, I shall set out of consideration all the minor points, because, it seems to me, the matter must be decided by looking at the agreement which the parties made, and at what has, in fact, happened with respect to the intended act of Parliament. Now, as I understand it, the intended South Union Company meant that their railway should commence in Store Street, Manchester, run through Ardwick, and so on to Stockport, and then proceed through a considerable tract of country, which, together with certain branches, would extend to eighty-eight miles. And, at the same time, the intended Manchester, Cheshire, and Staffordshire Company formed a design of making a railway, which was also to commence in Store Street, Manchester, and go through Ardwick to Stockport, but then to take a very different line of country, both with respect to its main line, and with respect to its branches; and the whole extent of that intended railway, with the branches, was sixty-seven miles.

The plaintiff and three gentlemen, who were the provisional committee of the South Union Company, make the agreement in question. [His Honor proceeded to read the agreement from the bill.]

Then what is the case?—Why, the plaintiff did give his

assent to the intended South Union Railway Act; and, when the competing parties for the two different lines of railway came into the House of Commons, the Committee of that House determined that neither railway should be carried into effect, but they made an amalgamation of the two original purposes, which had this effect, namely, that it adopted forty-seven out of the sixty-seven miles intended by the Manchester, Cheshire, and Staffordshire Company, and took twenty-seven miles out of the eighty-eight intended by the South Union Company,—that is, they took more than two-thirds of the Manchester, Cheshire, and Staffordshire intended railway, and very little more than one-third of the South Union intended railway. And then the act of Parliament was passed, which had the effect of making those persons who were projectors of the South Union Railway and those persons who were projectors of the original intended Manchester, Cheshire, and Staffordshire Railway a body corporate, not for the purpose of making the South Union Railway, or for the purpose of making the Manchester, Cheshire, and Staffordshire Railway, but for making a new railway, which, for all substantial purposes, appears to me to be a totally different railway from that which either party contemplated. I cannot understand how it can fairly and truly be said, that, for the purpose of considering the agreement in question, the act that was in contemplation by the projectors of the South Union Railway actually passed.

Whatever construction the plaintiff might put on it in his own mind, is one thing; but I am to consider that the persons who were projecting the South Union Railway, looked to the probability of their having in a great degree the right conceded to them by Parliament to make a railway, which should pass through their favourite towns and places, and extend to the length of eighty-eight miles; and thereby give them that remuneration which they might expect from a capital employed in the construction of a

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railway of that extent; and it by no means follows that, because some persons, with a view to having the South Union Railway carried into effect, might think it a reasonable thing on their part to make the bargain which was made with the plaintiff, that they would have made the same bargain with him, if in reality the railway which they had in contemplation had been a railway of so much less extent than that which they did contemplate making, and one going a totally different line. I must take it for granted, that the agreement, as far as the provisional committee of the South Union Railway was concerned, was made with reference to the intended South Union Railway, and then it comes to this, that so far from the South Union Railway being authorized by Parliament, the legislature interferes, and says, it shall not take effect, but that a sanction would be given to a totally different thing, if the two parties agreed on having an act passed for making that which neither of the Companies contemplated; and as to which it then offered them the choice of saying whether they would or would not have carried into effect.

The parties agreed to accept what the legislature proposed, and accordingly this act of Parliament was passed, which it seems to me absurd to say can be taken to be the act of Parliament which was projected by the intended South Union Company. Here is another thing to be considered, the South Union Company meaning to make their railway as it set out from Manchester, in a given direction, thought that they might be under the necessity of carrying their road through the central part of the plaintiff's property, and it might be a very fair thing when they were treating with the plaintiff, for him to say, "If you go through the central part of my property I will not make a bargain to sell you any land, unless you will buy at least 7,040 yards;" but the other Company had their line on the west of the plaintiff's property, and if they had originally been entering into a treaty with the plaintiff, they would have

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come to him with these terms, "We want only the corner of your land, and if you will not treat with us, and make what we think a reasonable bargain, we will defy you, and take the chance of your opposition," therefore, it does not follow on the mere fairness and equity of the case, that, as between those who projected the Manchester, Cheshire, and Staffordshire line, and the plaintiff, that the same terms which he exacted from a Company who were, as they thought, under the necessity of going through the centre of his land, would be made applicable to another Company who did not contemplate or feel that necessity.

Then, how does the case stand with respect to the assent of the plaintiff? There is a slight verbal inaccuracy in the way in which the plaintiff has stated this in his affidavit, and in his bill; but it is quite immaterial. It is the fact, that, in order to make up the requisite number of assents to the South Union Bill, the plaintiff was included,—the unit or figure set against his name was included as one, although his name was not actually mentioned. But he was returned as neutral with regard to the Manchester, Cheshire, and Staffordshire line.

Now, it is plain that the thing which was bargained for, if any thing at all, was an unqualified assent, and not of that equivocal character which would place the same man as an assenter and a neutral. It is impossible to say what might have been the effect of this, if there had been a preponderance of neutrals over the number of assents; but, certainly, the same thing was not given in effect by his standing in the character of a neuter, as well as an assenter, instead of standing alone as an assenter.

Then, if it be true, according to the substance of the case, that the act contemplated by the agreement of 14th February, 1837, did not pass, I cannot see what there was in the least degree binding in equity on the persons who represented the chairman and the provisional committee of the South Union Company, beyond giving that notice,

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which they actually did give in the month of September, to determine the original agreement.

I do not understand the plaintiff, by the bill in its present form, as at all making a case of election to come in for such right as he might have to be paid in respect of the 1,352 yards, according to the agreement of February, 1837: it is plain what is invariably insisted on from the beginning to the end, is the whole right to the agreement of February, 1837, and this case, therefore, is disembarrassed from that sort of difficulty which might have arisen, if it had been put in the alternative, and the plaintiff had said, "if I am not entitled to the whole benefit of my construction of the agreement of February, 1837, then I am under the agreement of the 13th of May, which took place between the two Companies, as notified by them, entitled to an option of saying, I will have 1,352 yards paid for, in the same manner as the agreement of February, 1837, provided for the payment of the 7,040 square yards." But, even in that view of the case, there would have been this difficulty: the agreement of May was an agreement between the two Companies—it left the agreement of the 14th of February, 1837, as it was; and it was a part of that agreement, that, in case the act intended by that agreement did not pass, the parties thereto of the second part, might put an end to it, by giving the notice which they in fact did give; so that, with respect to the agreement of the 13th of May, the agreement of February would have been just the same as if it had never existed. But the plaintiff has not put his case in that manner, but claims by his bill the full benefit of the largest construction that can be put in his favour on the agreement of February.

In my opinion, that construction cannot be maintained, and the consequence therefore is, that the injunction cannot be continued; I remember very well, at the time the application was made to me for the injunction, that my attention was particularly called to the agreement of May,

and at that time I had not the opportunity of fully considering the effect of the agreement of February, or the mode in which the act of Parliament actually passed, or of considering the precise effect which might be attributed to the agreement of May, having regard to the circumstance, that the notices were given in September and October. My opinion is, that this injunction should be dissolved, but I think it ought not to be dissolved with costs; there is apparently something like a case, and, considering the way in which the parties have been dealing with each other, I am extremely reluctant to do more than simply dissolve the injunction. The costs must be costs in the cause.

From this decision the plaintiff appealed.

Mr. *Wigram*, and Mr. *Sharpe*, for the plaintiff.—There are two points which appear necessary to be presented to the Court. The first, because on that ground the judgment of the Vice-Chancellor dissolving the injunction was rested; the second, because, although not noticed in the judgment of the Court below, it will, supposing this Court to differ in opinion with the Vice-Chancellor on the first point, form the only ground on which this motion can be resisted.

The first point arises on the contract made by the South Union Company with the plaintiff; that if their act passed they would take his lands; if, therefore, said the Vice-Chancellor, their act did not pass, the agreement is now at an end.

The second—supposing this Court to be of opinion, that, with regard to the first point, it be established that the South Union Act has virtually passed, and that the contract is binding, whether there has been any thing in the conduct of the plaintiff amounting (though not in the strict literal meaning of the term) to a waiver of the contract.

On the first point, the case of *Edwards v. Grand Junction Railway* (a) is the principal case; and there has been

(a) 1 Myl. & Cr. 650.

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a late case of *Stanley v. the Chester and Birkenhead Railway* (a).

Before the former case, it was a prevalent notion of equity, that where a contract had been entered into by several persons, dependant for its performance on a future event, the performance thereof might be avoided by the association of new members, with the original contractors, before the future contract came into operation, it being supposed that such new members were not bound by the original agreement. This notion of the equity existing in such cases, was got rid of by the decision in that case, by which the Vice-Chancellor, and afterwards this Court on appeal, in effect, say: That, as society altered, the existing principles of law were to be applied to meet those changes; not, that the principles of law were to be altered, but, that they were to be so adapted as to meet the exigencies of a changing state of things. Having once broken through a supposed technical rule, the Court will not spell itself back out of the very rule by which that technicality was first got rid of.

Applying the rule thus established to the present case: if certain persons, associated for the purpose of obtaining an act of incorporation, for the formation of a railway, enter into an agreement with a party to give his assent to such undertaking, on certain terms, and make use of that assent in obtaining the desired act, the persons incorporated by such act cannot refuse to deal with that party on the terms of their agreement, notwithstanding the original purposes under which the assent was given may have been varied, or some of the original contractors have withdrawn, and new members been added, or a new name given to the association.

The question, therefore, in this case, is,—have any of the present Company, by using the assent of the plaintiff, acquired a power, under the act, to take his lands? If so,

(a) Last Case.

it is immaterial that the purposes, members, name, or line of the proposed undertaking, may have been altered or varied, the present Company cannot, in using that power, take these lands, otherwise than on a strict equitable performance of that agreement.

Suppose one hundred persons make an agreement that fifty retire, and fifty new members be added; are not the new fifty bound by such agreement? In this case, it is not necessary to resort to an imaginary change of persons. Suppose two lines of railway and two companies, and that they agree to join together to form one company, each giving up part of its proposed line; by so doing, there is a change in each company: but is not the amalgamated company clearly bound by the reciprocal acts of its two constituent bodies? The present Company is, therefore, as regards the plaintiff, the South Union Company. The Company never could have come into existence without the assistance of those steps, which one of its essential components had arrived at through the assent of the plaintiff; and, if one individual member of the South Union projectors formed one of the Company who came out of Parliament, the Company became unable to make use of the power of taking the plaintiff's land, conferred by the act, without adopting the agreement which the South Union projectors had entered into with him.

In *Edwards v. the Grand Junction Railway (a)*, this Court thus lays down the rule:—"The Railway Company contend, that they, being now a corporation, are not bound by any thing which may have passed, or by any contract which may have been entered into by the projectors of the Company before their actual incorporation.

"If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes, every year, subjected to the power of the many

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incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said, that the Company cannot be sued upon this contract, and that Moss entered into a contract in his own name, to get the Company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway; it is, therefore, the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should be done by them. But the question is, not whether there be any binding contract at law, but whether this court will permit the Company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the Company and the projectors cannot be identified, still it is clear that the Company have succeeded to, and are now in possession of, all that the projectors had before: they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and, in prosecution of it, had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser: but, in this court, it would be otherwise. So here, as the Company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors, in their corporate capacity, and, at the same time, refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld."

It is clear, from the affidavits in this case, that the assent of the plaintiff was used, and that it contributed in enabling the South Union projectors to bring their bill before Parliament, from which the present act has, in a greater or less degree, resulted.

Secondly, with regard to the question of waiver. Supposing the plaintiff to have established the right to a specific performance of the contract in question; is he, by his conduct, precluded from availing himself of that right?

To constitute waiver, there must be express waiver by contract between the parties, or implied waiver, from a dealing with third persons, by the party seeking to enforce the contract, so as to mislead and prejudice the other party. An equity of this nature is not lost from the ignorance of its existence, or, where known to exist, from a dealing with third persons, inconsistent with the notion of preserving that equity, if the party on whom the obligation of performance rests, has not been misled or prejudiced thereby. It has repeatedly been held, that a vendor, offering lands contracted to be sold to other persons unknown to the vendee, is no waiver of the right to a specific performance. If, however, the party against whom the right is sought to be enforced has been misled or prejudiced, the ignorance of the existence of the equity in question will not preserve it: the distinction is between acts that do, and acts that do not, prejudice the other party. But, although acts have been done injurious to the other party, if that party has had full notice and intimation that the other party did not mean to relinquish his right; if, from time to time, that party has been told, "although I am doing so and so, I still intend to enforce my right to a specific performance against you;" there no waiver is incurred; because the one party had full notice of the intentions of the other party. That is precisely the present case. Whatever the plaintiff may have said to third persons—whatever acts he may have permitted to be done, the question is, were the Company ever deceived thereby? No: from beginning to end the plaintiff has always asserted, that the Company were bound to perform this contract, and that he always intended to enforce his right against them.

In this case, the plaintiff has always asserted, that the

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South Union Company were bound to perform their contract with him: he has uniformly so stated to them; and, even had he not done so, there is nothing, considering that the plaintiff was the owner of the adjoining lands, and that, under the powers of the act, the Company possessed the power of deviating to the extent of one hundred yards, in what either the plaintiff has written or said to the Company or other persons, or in what he has permitted to be done by the Company or their workmen, inconsistent with the reservation of the right to have the contract of February performed.

The *Solicitor-General*, Mr. *Jacob*, Mr. *Koe*, and Mr. *Loftus Lowndes*, for the defendants.—No part of the argument, on behalf of the defendants, is intended to question the decision in *Edwards v. The Grand Junction Railway* (a). The principle laid down in that case will not be attempted to be impugned in the minutest particular: but certainly, if that principle is to be applied to the facts of this case, neither this Company, nor any other company hereafter incorporated, can carry out the objects for which they are formed. That case was not a case of contract or no contract; but was an application to prevent a party acting contrary to an agreement.

The want of mutuality is a sufficient reason for refusing a specific performance of an agreement. Suppose, therefore, concurrently with the South Union contract, a contract with the Manchester, Cheshire, and Staffordshire Company, at different prices, and suppose every thing to have happened that has happened here, and the members who compose the South Union Company to say that their contract is good, because their act has passed, and the Manchester, Cheshire, and Staffordshire Company to say “a multo fortiori” is their contract good, and each to in-

(a) 1 Myl. & Cr. 650.

sist on a specific performance :—how could both contracts be performed ?

Suppose, secondly, that the present Company sought to enforce this as a contract for their present line, would not the plaintiff be at liberty to say, that he contracted with a Company who contemplated going through the centre part of his lands ; that he had particular reasons for wishing to preserve the particular parts through which the present Company's line is intended to pass ; and that he decidedly objects to the taking of any part of his lands other than that which the South Union Company's line proposed to take ? [*Lord Chancellor.*—But I understand it, that, under the powers of deviation contained in the act, the present Company might actually take that identical part of the lands which the South Union line contemplated taking.] This land is in a town ; the bill states, that the plaintiff is seised of certain pieces of land laid out for building purposes, and on which some houses are already erected. The deviation allowed in a town is only ten yards, and one hundred yards in vacant ground. [*Lord Chancellor.*—In the schedule to the act, it is described as “vacant ground ;” we must be bound by what the act says.] The equity attached to the fact of the name of the plaintiff having been used as an assent to the present act, and on which the *ex parte* injunction must have been obtained, fails when the affidavits on this part of the case are considered ; the affidavit on which the injunction was obtained was positive as to the fact of the plaintiff's name having been used as an assenting party ; the affidavits of Bowker and Lowe shew that the lists made out for both houses of Parliament, on the passing of the present act, were made out “reddendo singula singulis ;” and the plaintiff having been returned as neutral to the Manchester, Cheshire, and Staffordshire line, was also returned as neutral to the present bill, which adopted, as far as the plaintiff's lands are concerned, the line to which he was returned as neutral.

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By his affidavit, in reply, the plaintiff has lowered the positive language of his first affidavit to a belief on circumstances which clearly have nothing to do with the passing of the present act. The case for the defendants is not rested on the right to a specific performance being waived by dealing with third persons, but that a party having that equity must be prompt in his measures to enforce it. On the 5th of December, 1837, the plaintiff was aware that the present Company denied his right, and held him at arm's length; but he never asserted any right until the 15th of June, 1838. Subsequently to the letter of the 5th of December, 1837, he called constantly at the offices of the engineer to inquire what quantity of his lands would be wanted; he was shewn the exact line the railway would take, and the line would shew the quantity; because the railway was, by the act, to be twenty-two yards wide, and, consequently, would be eleven yards on each side of the line; he was a witness to the staking out and boring of his land, and never objected; he had plans of his land made and distributed; he sent for information relative to letting his land for brick-making; he permitted the designs for the railway to be completed, and advertisements for letting the contracts to be inserted in the public journals; and, on the 15th of June, when all this has been done, for the first time insists on his contract.

Would the same equity exist if the Company had altogether avoided the plaintiff's lands? Clearly not;—but the affidavit of their surveyor asserts that the Company might have done so if the plaintiff had raised any question previous to the time when it was too late to alter the designs. The Company might also, had the plaintiff insisted on this right, have laid down their line so as to have made the most of the land they were thus compelled to take, instead of purchasing, as they have done, adjoining land at a large price.

With regard to the notice to determine the contract, the plaintiff did not treat it as a nullity, which, if the contract

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was binding, he must have considered it to be, but only insisted that another quarter's rent would be payable on account of a fancied informality in the service of it.

At all events, the injunction ought not to be continued. If, on the final hearing of the cause, the plaintiff obtains a decree in his favour, he will then be entitled to, and can then be paid the full amount of the contract price for the whole 7,040 yards. In the meantime, he can at once be paid for the 1,352 yards required by the Company, at such price as a jury may award; and, as before said, if successful at the hearing, he can, in addition to the contract price for 7,040 yards minus 1,352, be paid the difference (if any) which either the parties themselves, or the Master of this Court, shall find to exist between the contract and jury prices for the 1,352 yards. But the Company ought not to be compelled to pay the full amount of the contract price, in the first instance, to the plaintiff, who may become insolvent, and unable to repay the Company should his bill eventually be dismissed.

In this view of the case there is only one event, in which the interests of the plaintiff can in the slightest degree be affected; namely, that, supposing a final decree to be made in favour of the plaintiff, the Company may be insolvent, and unable to pay the difference found between the contract and jury prices for the 1,352 yards; the plaintiff will have a lien on the whole land minus 1,352 yards, for the purchase-moneys, and he will have had the price affixed by the jury for 1,352 yards actually paid, the utmost loss, therefore, that the plaintiff can sustain, will be the difference (if any) between the contract and jury prices for the 1,352 yards. Even this view of the case supposes two most improbable events, the insolvency of the Company, and the inadequacy of the price awarded by a jury.

On the other hand, if the injunction be granted, and the plaintiff be unsuccessful at the ultimate hearing of the cause, protracted probably to a late period by appeals,

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references to, and inquiries before a Master, the Company will, during all that period of time, have been stopped in the completion of the whole of their operations; for it must be remembered, that a stoppage of even ten yards in a railway line is virtually and in effect a stoppage of the whole line; and, although the time limited by the act, in which the railway must be completed, may not have elapsed at the time of the final decree in the cause, yet the Company will in one sense be most materially injured, by being unable to complete their undertaking, and thereby losing the revenue to be derived from the early opening and commencement of their operations. The loss to the Company of the revenue to arise from even one week's delay, in the commencement of this undertaking, would be infinitely more than the sum in dispute between them and the plaintiff. And these are the reasons why injunctions are so often applied for against railway Companies: the person applying is well aware that if he succeeds, the Company must buy him off, or incur a much more serious loss from the delay of their proceedings.

Were these difficulties even equally balanced, the Court would not continue this injunction, unless it be quite clear that a decree must finally be made in favour of the plaintiff. That question has been carefully considered by the Court in more than one case, and, in the case of the *Attorney-General v. The Mayor of Liverpool* (a), the Court says, "The effect of continuing the injunction, would be to exclude questions of great difficulty from being ever discussed; for if the Court formed a wrong opinion as to the construction of this clause, and acting upon that opinion, maintained the injunction, it is quite clear that the defendants would be shut out from the means of raising these questions, and of having this opinion reviewed, at least in the tribunal of the last resort, by an appeal to the House

(a) 1 Myl. & Cr. 207.

of Lords, because the time would have passed, the corporation would have ceased in whom, if they exist at all, the powers claimed by the defendants are now vested. It is obvious, therefore, that to continue the injunction, instead of being, as it ordinarily is, the means of preserving rights, would in this instance operate to destroy them."

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Mr. *Wigram*, in reply.—There is only one point in the argument against this motion, by which the case of the plaintiff is at all pressed; namely, the question whether the conduct of the plaintiff may not have affected the equity of his case; but, if the ordinary tests of evidence are applied to this case, any doubt on that subject will be completely removed.

It will be necessary, however, before proceeding to that part of the case, to consider very shortly, whether, supposing his conduct not to have excluded his equity, he has that equity.

What is the simple equity of cases of this nature? A person is desirous of obtaining a power to enable him to pass through the lands of another party, whose assent or dissent to his design will most materially affect the obtaining or withholding of that power; he procures the assent of that party on certain terms, and by the use of that assent obtains the desired power; he cannot exercise that power, against the wishes of the other party, except upon a strict performance of these terms. The test to be applied to all these cases is, did or did not the one party agree for the lands of the other party, and does he or does he not want those lands? If he does, he must perform his agreement.

It has been said, in the course of the argument on the other side,—Suppose two contracts with two parties at different prices, and suppose also a case like this—which contract ought to be performed? Probably, if such a case ever arose, the vendor would have a right to elect which of the two contracts he would perform: but the plaintiff

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is not driven to struggle with hypothetical questions of difficulty; it is a sufficient answer to say no difficulty of the sort exists in this case.

The question here is not, has the plaintiff made out his case, but, have the defendants distinguished theirs from the general rule on which the plaintiff relies.

It is said on the other side, that the plaintiff was not an assenting, but a neutral party to the Manchester, Cheshire, and Staffordshire line, and that that line alone was considered before the Parliamentary Committee. Even on their own shewing, they have derived an advantage by returning him as neutral, instead of a dissenting party.

The case of the plaintiff is, that he dissented in writing; and he must have done so, if the fourth of the then standing orders of the House of Commons was complied with. By one of the affidavits filed on behalf of the defendants it is said, that the plaintiff refused to treat with the Company, except upon terms which were considered exorbitant; why, the very fact of a person demanding exorbitant terms, as the condition of allowing a railroad to run through his lands, is inconsistent with the notion of his being indifferent whether that railroad passed through his lands or not, and precludes the idea of his being neuter.

Against, therefore, this positive assertion of the plaintiff, and this inference, there is only the affidavit of Lowe, who says, that in the lists which he prepared, the plaintiff was returned as neuter; but this affidavit misses the point. Lowe says he was employed to make out the lists, but by Wheeler, not by the committee; and there is no evidence to shew that those lists were unaltered, when laid laid before the committee.

Then, it comes to this—are the Company absolved from the contract or not? If not, then the plaintiff is entitled to say, that they shall not touch his lands, until they have paid the purchase-mones contracted to be given for them. In all cases, where the debt is a legal debt, the legislature

says, they shall not touch the lands until they have paid for it, and the act gives to the land-owner a prompt remedy to prevent them doing so. Where, therefore, as in this case, by agreement between the parties, the debt has been taken out of the act, and converted into an equitable debt, this Court is bound to give to the land-owner the same protection that the legislature would have given to him had the debt been a legal debt.

Under the ordinary rules of this Court a purchaser never can enter upon the lands contracted for without paying the purchase-money; neither therefore can a Company: a corporate body has no more rights than any one of the component members would have had in his individual character. It is never permitted to an individual purchaser to urge as a reason against this rule any grounds of its inconvenience, and it cannot be permitted to this Company to do so. The argument of hardship and inconvenience in granting the injunction therefore totally fails.

With regard to the second question—Has the plaintiff so conducted himself as to have led the defendants to suppose that he had waived the contract, and have they, in what they have done, acted on that supposition? It is true, they say that they have staked out the ground, and have advertised the letting of their contracts, but it has never been said, that the conduct of the plaintiff led them to do so; in not one of the numerous affidavits made on the other side is that attempted to be alleged; neither Buck, Lowe, Bowker, Wheeler, or Barbour, in any of the affidavits they have made, swear that they believed, or that the impression on their minds, or of any one member of the Company was, that the plaintiff had abandoned the contract. They had, in fact, full and distinct notice from him that he had not done so, and that he did not mean to abandon the contract.

Although the South Union Company had, as a distinct Company, ceased to exist, and had a separate office from that of the Manchester and Birmingham Company, for the purpose of winding up that concern, yet if the members

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of the latter Company, who were, or had been members of the South Union Company, received distinct notice from the plaintiff that he considered the contract as subsisting, and would hold them to it; and, if the South Union Company are the present, or any part of the present Company, can it be said, that, because other persons are connected with them in forming the present Company, who have not had such direct notice as the members of the South Union Company have had, that therefore due notice of the plaintiff's intentions had not been given to the Company? It is the fact, that, out of the thirty-seven persons whom the act of Parliament has incorporated, twenty-two are members of the original South Union Company.

What has the plaintiff all along been insisting on?—that the South Union Company were bound to him. It does not signify what the Manchester and Birmingham Company said, or what the plaintiff believed, if he has constantly asserted that the South Union Company were bound. It is, at the most, on the side of the plaintiff, a mistake in a conclusion of law, not of fact. It is quite clear, that the plaintiff has always, from the first moment of making the contract down to the month of June last, required the South Union Company to fulfil the contract in its strict literal terms. If the injunction shall not be continued, the purchase-money must, at all events, be brought into Court.

Dec. 13th.

The LORD CHANCELLOR.—This case turns entirely on two questions, and those not of very extensive inquiry as regards the matter of fact. The first, upon which the Vice-Chancellor decided the case, is, whether the Manchester and Birmingham Railway Company are or are not bound by the contracts entered into by the projectors of the South Union Company; secondly, if they are so bound, and the plaintiff ever had a right against the existing Company, whether any thing has taken place to

prevent him asserting that right by means of an injunction. In the view I take of this case, it will not be necessary for me to give any opinion on the first point, and I am not sorry to be able to avoid doing so, inasmuch as it is a question of very great nicety and difficulty, and, therefore, only to be decided, where it is absolutely necessary to do so, for the purpose of administering justice. I find in this case, what appear to me to be very safe grounds for disposing of it without touching on that point, and I shall therefore assume, for the purpose of explaining the grounds on which I have come to the opinion I am about to express, that the plaintiff has a right as against this Company, to have the contract performed, but without laying down any rule on the subject.

The second question is, supposing that right to have existed when the act passed in the month of June, 1837, whether any thing has taken place between that period and the month of June, 1838, when the contest arose, to deprive the plaintiff of the jurisdiction of this Court, by way of injunction, for the purpose of protecting such right. The right if it existed, of course existed from the time the act passed, and is, properly speaking, not a right of contract, but a right arising out of a contract; for neither in this nor in the case before me that has been referred to, of *Edwards v. The Grand Junction Railway Company* (a), was the contract between the contending parties; but the equity is this, that, from what has taken place, and the position in which the parties are placed, the parties seeking the benefit of the contract have a right to the interposition of this Court, by virtue of an equity which induces this Court to deprive the defendants of the exercise of their legal rights, and in that mode compels them to adopt a contract entered into by others. In considering the evidence on each side as to the conduct of these parties,

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subsequently to this right being brought into operation, if it ever existed at all, namely, in the month of June, 1837, there is one fact established by the plaintiff, which is of very considerable importance in looking at the effect of the transactions which took place. In considering how far a party has by his own conduct lost the benefit of an equity, which he at one time was entitled to, it is very obvious; that different considerations must be applied to a case, where that party is himself cognisant of the equity, and a case where he may not be so cognisant. If the case should arise, in which both parties are ignorant of the equity and of the right which the one party might have asserted, if he was aware of it, it may be open to considerable doubt, how far he ought or ought not to be prejudiced in the assertion of that right which belonged to him, by the situation in which the other party may have been placed owing to the non-assertion of it. But if the plaintiff is cognisant of his right, then, of course, he is not to plead that he did not assert it sooner from not being aware of the benefit which the assertion of such equity in this Court would give him. The plaintiff has relieved this case from that difficulty, because, in a late affidavit, so late as the 24th of November, he has stated this, that in searching among his papers, he found a letter which he had sent on the 7th of October, 1837, when he received notice of the intention of the Company to determine the tenancy created by the contract. That he sent an answer to that letter, [His Lordship read the letter from the affidavit of Wilson (a).] So that he tells us in his own affidavit, that he, on the 7th of October, was aware of the equity, and was prepared to assert it. Whether it be so or not might be a matter of some doubt, if it were material to inquire into the probable accuracy of that statement. I say the probable accuracy, because I find an attempt to substantiate it

(a) Ante, p. 86.

by evidence which, in my mind, throws infinite doubt on the truth of it. I find he not only swears to it himself, that is, swears to a letter which is not forthcoming, and which he never adverted to before, though this is the third affidavit which he has made; but attempts to establish and confirm his own statement by the affidavit of T. Wilson, who describes himself as in the service of the plaintiff, and states that he was employed to deliver the letter, and then swears to a copy of it, without saying he ever compared or read it, and takes upon himself to swear in these terms:—[His Lordship read the first part of the affidavit.] And then he gives the copy in the way set forth, without any explanation of how he is enabled, in this affidavit of the 24th of November, 1838, to swear to the words contained in a letter which he was merely employed to deliver in October, 1837. It may be true, and it is not material to inquire into the probability of its truth; but, after having made that statement, the plaintiff is precluded from saying he was not, in October, 1837, perfectly aware of the equity which he is now asserting; and his conduct must be looked at as the conduct of a party perfectly cognisant of his right. Now, in considering the evidence, two things must be borne in mind,—namely, the undisputed fact, that, upon the union of the two Companies, it was part of the agreement between them, that the parties succeeding should, as far as was practicable and consistent with their scheme, adopt all contracts made by the other parties;—secondly, that, quite independently of enforcing the contract for the purpose of compelling a purchase of the plaintiff's land, there was a question existing (adverted to in that very letter) between the plaintiff and the proprietors of the South Union Company, not as to the completion of the contract for purchase, but as to the period at which the tenancy was to determine, —a question depending on the validity or invalidity of a notice which had been given. Keeping those two undisputed facts in mind, it seems to reconcile some part of the

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evidence which would otherwise appear to be totally unintelligible. The arrangement, forming part of the contract, appears to have been communicated to the plaintiff. He, therefore, if he thought he had a right to enforce the contract, must have been aware, that there was a possibility that the Company, actually brought into legal existence by the passing of the act, might, to a certain degree, if not to the full extent, adopt the contract he had entered into with the South Union Company. Nothing had passed to preclude them from adopting the contract, if they thought it expedient so to do; and it was a question, therefore, which remained entirely open, whether, if he had not a right to enforce it, he might not obtain the benefit of it by the new Company electing to take upon them the contract between the plaintiff and the projectors of the South Union Railway. On the part of the Company, certain facts are stated which, if not denied, qualified, or explained by that which is stated on the part of the plaintiff, would, I think, be conclusive against the right of the plaintiff to assert the title he is now asserting; because it is an undisputed fact, that, in the month of October following the passing of the act, the usual course was adopted; circular notices were sent, indicating to all persons who received them, and particularly to the plaintiff, the intention of the Company to proceed under the powers contained in their act. That notice was followed by actually marking out, in the month of January, the line adopted by the act. Other transactions took place between January and May, not distinctly specified, but consisting of measures necessary to be taken previous to the actual commencement of the works; and, in the course of that time, the plaintiff is stated, in the affidavits, to have applied on various occasions to the officers of the Company to know what quantity of land they would require in carrying their act into operation. It is, also, in proof, that, in dealing with a brick-maker, a conversation took place which shews that he contemplated dealing with

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his land as his own property, saving only so much as the Company might require for the purpose of their line. These facts, as stated by the Company, are not matter of dispute; and, if standing by themselves, unexplained, would bring the plaintiff into this position,—that, with a knowledge of his right, he not only permitted the Company to act in execution of their legal rights, and therefore without reference to the contract, but permitted them to proceed to the extent they did in the execution of their intended line; and it is stated, and not contradicted, that, under the provisions of the act, if it had been thought expedient, and the plaintiff had asserted his right, it would have been quite practicable for the Company to have adopted a line which would have avoided any contact with the plaintiff's land. The affidavits produced on the part of the Company certainly fall short in not stating more distinctly what it was the Company did; but, to me, it is perfectly obvious from what is stated, that so much expense must have been incurred, and so much work done, between January and June, when the plaintiff first asserted his title, that the judgment of the Court, with respect to the injunction, cannot be at all affected by the particular acts not being specified. The mere expense of engineering and marking out the portion of the line of railway passing over the plaintiff's land is probably not great, but it is necessarily connected with the whole length of the line, and the engineering process of marking out the whole must have caused considerable expense. It is in proof, that, in the month of May, advertisements were published for the purpose of receiving tenders for contracts to carry into effect the works on the projected line; but it is not stated that any such contracts were made. Now, the plaintiff meets this by saying, that whatever the Company may have done was not at all induced by any thing he did; that, not only was he always aware of his right, but he uniformly declared his intention of acting on it, and communicated that formally and openly to

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the Company; and that he ought not to be affected by any thing the Company have done with such notice. This was put in argument by saying, that the parties with whom the contract was made, and with whom such communications took place, namely, those who were the projectors of the South Union Railway Company, were become acting members of the Company incorporated under the act; and that the notice which they derived from their knowledge in the former character must be brought home to them in the latter. So far as notice and knowledge goes, that observation is perfectly true; but the question is not one of notice or knowledge, but of the dealing of the plaintiff with those who represented the different Companies. If the plaintiff asserted, as against the projectors of the South Union Company, an intention of some day or other enforcing against them, in that character, the rights which he might be entitled to under his contract, and, if dealing with those who represented the existing Company, he not only abstained from making any claim against them, but permitted them to proceed in a way which was inconsistent with his right, and not only so, but became, by communication with them, a party to the understanding that they were at liberty to proceed in the execution of their line without being affected by the plaintiff's contract, those circumstances would deprive him of the right, not of enforcing any equity he may possess against the projectors of the South Union Company, but the right which he now asserts of interfering with the operations of the Company under the authority of the act.

A great part of the evidence which the plaintiff has adduced, consists of communications which took place between himself and others, for the purpose of shewing what was present to his own mind, and what his own intention was. I have before observed, the question between the parties does not depend on what was in the plaintiff's mind, but what was operating on the minds of those who were the ex-

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isting Company, induced by the course of conduct the plaintiff himself pursued; and I cannot but observe that, on looking at the plaintiff's affidavits, and at some of the affidavits which he has adduced in support of his case, there is very strong reason to suppose, that what did take place ought not to be referred to that to which the plaintiff wishes to refer it, namely, the intention of asserting a right against the Manchester and Birmingham Company, but had an entirely different object, and was addressed to a totally different subject. Now, bearing in mind the plaintiff's statement, that he always intended to assert this right against the existing Company; and also, bearing in mind, that the contract which existed made it probable, or, at least, possible, that he might have the benefit of his contract, by the voluntary adoption of it by the new Company, I think expressions are to be found in many of these affidavits, shewing, that what did take place was not with a view of asserting any title, adversely, against the existing Company, but merely to the possibility of their adopting the contract. Take his own affidavit. [His Lordship read the statement of the reason assigned by Taylor for setting out the whole of the plaintiff's lands on the plan]. That is strictly consistent with the idea, that it was optional, on the part of the new Company, to adopt the contract he had entered into with the directors of the first projected Company, but inconsistent with the idea that he had a right to enforce that contract; for, in that case, he would have been entitled to enforce it, whether they carried out their plan or not. He says, in another passage—[His Lordship read the plaintiff's explanation of his communication with Mather]. This refers to the possibility, that the Company might act on the option which their arrangement with the other Company gave them. There is another affidavit produced in support of the same proposition,—that of Phillipson.—[His Lordship read the affidavit]. Now, if he really at that time entertained that opinion of his right, upon

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which he now insists, the real objection to selling was, not that he had contracted to sell to the projectors of the South Union Company, but that he had that which he understood to be an actual binding contract with the directors of the Manchester and Birmingham Company; but the same affidavit contains these words: "That he was advised so to do, in order to save expense in making out another plan, in case the Railway Company should not carry out their act." The same observation applies to this, as to the affidavit of the plaintiff himself; namely, that it is any thing but an assertion of right against the Company; it is, at the most, an expectation, founded on the contract between the two companies, that the one might take the contracts made by the other. The affidavits which state it differently, that is, which do not give this representation, are of no weight, as balanced with those which do; because, there is brought home to the party himself, a statement of his reasons for wishing to sell the whole of his land, and for having a plan of the whole made, than which nothing could be more inconsistent with the idea of his supposing that he had a right against the Company, to the benefit of his contract, whether they carried out their project or not. Then there is the letter of the 23rd of January. [His Lordship read this letter]. If there is any ambiguity in the transaction, this letter appears quite sufficient to remove it. It is impossible to suppose, that the person writing this letter could have intended to hold out to the Company, that he had a contract or an equity which, as against them, he was entitled to enforce. He writes to them quite consistently with the fact of their having an option, not binding upon them, but which he would be glad to avail himself of, if they thought proper to adopt the contract, but quite inconsistent with any intention to enforce it against them. By his own affidavit, he states he knew of his right, and, if he knew of his right, there is here a distinct communication passing between the parties in January, in which he surrenders that right,

and puts it to them, what quantity of land they will take, and leaves it for them to choose, whether they will perform the contract or not. With this letter in their hands, and with all this communication taking place between themselves and the plaintiff, the Company proceed in their works to a certain degree,—to what extent is not said,—and never, until June, is this title asserted. Upon this state of the evidence, I have no hesitation in saying, that the party is not entitled to the injunction of this Court, for the purpose of preventing these works being carried on, which he by his sanction and conduct has, at least from January, until he made his demand in June, encouraged. Certainly, if I had more doubt upon this subject than I feel, I should be much influenced by considerations similar to those which operated upon my judgment in the case of the *Attorney-General v. The Mayor of Liverpool* (a), because, if it was a question whether the conduct of a party had or had not deprived him of the right of asserting an equity against the existing Company, it must be always considered upon which side the danger most preponderates. The proposition of the plaintiff is, “I have a right as against the existing Company, to compel them to make a certain purchase at a certain price.” The Company say, “You have no such right.” That is the question between them. What the Company are doing, is, taking part of that land under the powers of their act, which, even if done adversely, will not preclude the plaintiff, if ultimately he establish his right upon the hearing of the cause, from compelling the Company to take the whole of the land under the contract. Whilst on the other hand, even if the evidence was doubtful, and the Court had no means of coming to any satisfactory conclusion upon it, the granting the injunction would certainly produce irreparable injury to the Company, for if it ultimately turn out that the

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plaintiff has not this right, it is obvious, that, to prevent the Company from following up this part of the line of railway, is saying, that they must submit to any sacrifice, or suspend their works until they do that which is entirely out of their power. This would be exposing them to loss and injury, far beyond that which they could be compensated for. That, however, is no answer, and these Companies should be aware that it is not, if there be a clear case against them; but here the Court would be in infinitely more danger of doing an irreparable injury, by granting the injunction than in refusing it.

This case comes before me, not properly as an appeal from the order of the Vice-Chancellor. The Vice-Chancellor dissolved the injunction without costs; and the parties have very wisely not rested their case upon the mere merits as they were before the Vice-Chancellor; but have added to their notice of motion that which would amount to a new motion, for the purpose of obtaining an injunction, if I should be of opinion that it is a case in which the facts justified the Vice-Chancellor in making the order, though new facts are introduced by the plaintiff for the purpose of maintaining the injunction;—I say they are wise in doing so, because, on looking at the affidavit upon which the injunction was obtained, and comparing it with the facts as they now stand, if the case had been brought before me simply upon the merits of sustaining an *ex parte* injunction, I should have had no hesitation in dissolving it, not upon the merits as they now exist, but upon the demerits of the affidavit brought before the Vice-Chancellor for an *ex parte* injunction. There would have been two grounds which would have been quite sufficient to justify that course:—First, the unqualified way in which the plaintiff sets up his title, and does not go into the question, whether he was a dissenting or a neutral party as to the Manchester and Birmingham line, and the unqualified manner in which he states that his assent to the South Union

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line was used as the means of obtaining the act of Parliament which now exists;—secondly, the way in which the plaintiff drops all mention of what took place after the month of December, 1837. He states, “that, subsequently to the 5th of December, 1837, an application was made to him to state what claim he made upon the Company.” [His Lordship read the passage from the bill.] Then comes the letter of the 26th of June, representing that, from the month of December to the month of June, the plaintiff uniformly insisted upon his contract, and refused to treat upon any other basis; whereas there is conclusive evidence to the contrary. I consider that as a misrepresentation of what really took place; and, if it had been properly represented to the Court, I am quite satisfied the *ex parte* injunction would not have been granted. I have not now to consider what the case would be if the application had been merely to continue the injunction obtained *ex parte*, because this is a new motion, which the party might have made even if, upon the ground adverted to, he had lost the injunction which was obtained *ex parte*. I am perfectly satisfied, on looking through all the affidavits which have been filed, that I cannot interfere by injunction. The only doubt I have is with respect to the costs. The facts free from doubt are quite sufficient to induce me to refuse the motion; but there are many important facts, on both sides, with regard to which, in the present state of the evidence, it is impossible to ascertain the truth; and, though I do not think that the plaintiff’s conduct has been that which the Court is entitled to expect, particularly the original affidavit he made in support of the injunction, yet, considering the view the Vice-Chancellor took of the case, and the view I take of it, I think the right order to make, is to refuse the motion, without making any order as to costs.

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Between JOHN SEMPLE, - - - Plaintiff,
and

THE LONDON & BIRMINGHAM RAILWAY

COMPANY, - - - Defendants.

*August 14th
and 25th.*

A Railway Company erected near to the premises of the plaintiff certain ovens for the making of coke for working their locomotive engines, and commenced using such ovens in the month of April, 1838. In the month of August following (some correspondence having taken place in the meantime) the plaintiff filed his bill complaining of nuisance arising from the use of the ovens, and praying an injunction to restrain the same. The nuisance set forth in the bill, and referred to in the affidavits, was threefold; first, injury to health; second, injury to the enjoyment of the dwelling-house and deterioration of property; third, the increased danger of fire. Counter affidavits on these points were filed on behalf of the Company, and also affidavits shewing that the coke-works were necessary to the carrying on of the business of the Company.

The Vice-Chancellor having granted an injunction, *held*, by the Lord Chancellor, reversing his Honor's decision, that the jurisdiction of the Court of Chancery, in a case like the present, exists for the purpose of protecting a legal right, and is not an original jurisdiction, and that no reason being shewn why the plaintiff had not proceeded in the first instance to establish his right at law, the Court would not, on conflicting affidavits, try the question of nuisance, and, therefore, that the injunction could not be sustained.

THE bill stated, that the plaintiff is now, and has been for seventeen years last past, the owner and occupier of a house, timber-yard, workshops, wharf, and premises situate in the Commercial Place, Regent's Canal, in the county of Middlesex, bounded on the south by the Regent's Canal, on the north by the Commercial Road, and on the south-west by a path leading from the Commercial Road to the towing path of such canal. That he has, for many years past, carried, and now carries, on the business of a wharfinger, and also the trade of a timber-merchant, and part of his stock consists of hard woods, such as yew, satin-wood, holly-wood, and ambryna, and similar productions, all of which are of a fine and delicate texture and appearance, and require to be kept clean and untarnished for the purpose of working and for sale, and if such wood or other productions are soiled and tarnished, they thereby become the less saleable in proportion to such soiling or tarnishing, and, to a great extent, become wholly unsaleable. That the plaintiff selected the premises, and considered them particularly well calculated, as in fact they were, for carrying on such trade or business up to the time of the nuisance after complained of.

That, by an act of Parliament made in the 3rd year of the reign of William the Fourth, intituled "An Act for making

a Railway from London to Birmingham," it was enacted, that certain persons therein named should be a body corporate, by the name and style of "The London and Birmingham Railway Company;" and by that name might sue and be sued; that such Company have become, and now are, by virtue of such act, the owners and occupiers of lands on the south-west and north sides of the plaintiff's premises, so as to surround the same on such sides; and the premises of the Company are divided from those of the plaintiff only by such path and Commercial Road, and on the south-west by a wall or building about eighteen feet high, separating the lands and premises of the Company from such path, the width of which is ten feet only in any part adjoining the premises of the plaintiff.

That, in the month of September, 1837, the Company commenced the erection of certain coke ovens upon a part of the land lying south-west from the plaintiff's premises, and at a distance of forty-five feet only therefrom, which they completed in the month of April, 1838, and the same consist of eighteen ovens, adjoining each other, in a connected line of building, running parallel with the south-west front of the premises of the plaintiff, and nine of such ovens are on the east side of such line of building, facing towards and nearly equidistant from the premises of the plaintiff, and the rest of such ovens are on the opposite side of the same line of building. That, on the 26th of April, 1838, the Company commenced using a portion of the ovens in burning coke, and have ever since continued to work, and now work and use the same; and the number of ovens so used have gradually increased, and the whole eighteen are now in full operation. That the process used by the Company in burning coke is highly prejudicial to the health of the plaintiff and his family, and they have suffered considerably in health, and their comforts and enjoyments have been seriously abridged thereby during the period the Company have used and worked the ovens, in consequence of the

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dense volumes of smoke and ashes or dust issuing therefrom during all the period of such working and making coke. That from such coke ovens daily arise vapour or smoke and minute particles of black substance, to the great injury of the furniture in the dwelling-house of the plaintiff. That, from the proximity of the ovens and chimney, the dwelling-house and premises of the plaintiff are in danger from fire, and are become uninsurable in any of the public offices of insurance against fire, except upon a rate of insurance higher than the ordinary rate; and the plaintiff, as evidence that the inmates of his house are, and are likely to be, greatly injured in health by the process of making coke, charged, that, at a certain period of every day during which the ovens have been so used and worked, namely, at about four o'clock in the morning, the Company, by their agents, workmen, and servants, have been in the daily habit of throwing a large quantity of cold water upon the coke when the same is in a state of extreme heat, for the purpose of cooling it, and, on all such occasions, the coke emits a gas, and vapour, and smoke, and large quantities of ashes or dust, and such gas is of a very offensive and deleterious quality, highly prejudicial to the health of any person inhaling the same. That the practice of daily pouring cold water on the burning coke has continued for the last four months, and such vapour, smoke, and ashes have been so emitted, and have entered the dwelling-house of the plaintiff, notwithstanding every precaution taken by him to the contrary, and his health, and that of several members of his family, has been greatly injured by inhaling such gas and vapour, and they are now suffering in their health therefrom. That the use and enjoyment of the dwelling-house and premises of the plaintiff have been thus taken away. The bill charged, as evidence of the injury and damage done, that, at a certain time in every day, there issue from the works of the Company clouds of dust or minute ashes, which very frequently fall into and upon the dwelling-

house and premises in large quantities, and, by means thereof, the said wood and other effects are liable to be greatly injured, soiled, and tarnished, and the trade of the plaintiff is liable to be thereby injured and diminished as to extent and profit. That such dwelling-house and premises are in a situation to which the water supplied by the metropolis is not carried by pipes in the usual way, and the plaintiff has no spring-water on his premises, but has tanks, and cisterns, and pipes constructed on his dwelling-house and premises to collect the rain-water from the roof thereof for culinary and other purposes; and the water in such tanks and cisterns becomes so impregnated by the ashes or dust from the coke and coke-ovens falling into the same as to be thereby rendered wholly unfit for such culinary or other domestic purposes.

That, independently of the smoke, and vapour, and ashes, daily created by such coke-ovens and works, the soot in the chimney thereof, is liable to become suddenly ignited, and, in consequence, the dwelling-house and premises of the plaintiff, and his wood, and other effects, are in constant danger of being consumed or damaged by fire, by the ignited cinders, ashes, and sparks from the summit of the chimney falling into and upon his premises, and that it is a part of his business as a wharfinger, to land on his wharf from the canal, and also to receive, for the purpose of transmission by the canal, divers articles of a combustible nature, such as seasoned timber and wood, which for a time remain at the wharf, until transmitted. That, when the soot in the chimney of the coke-ovens takes fire, as aforesaid, the ignited cinders, ashes, and sparks, which are so discharged, fall upon the dwelling-house and wharf, and generally upon the premises of the plaintiff, and thereby such premises, and such combustible matters and things, are constantly in danger of being ignited, and consumed by fire. That, on the 19th of June, 1838, so great was the alarm occasioned to the plaintiff, by the burning of the soot on that day,

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that he thought it necessary to make application to the Sun Fire Office, to insure his stock on the premises from fire, but, after causing the usual inquiry to be made, as to situation and risk, the Sun Fire Office refused to insure such stock at the common rate of insurance, and demanded special terms, and a higher rate of premiums for the future insurance of the dwelling-house and premises of the plaintiff; in consequence of the additional risk, although, up to the then last payment of the annual premiums, he had only paid the common rate of insurance premium.

That the dwelling-house and premises are greatly deteriorated in value, by the erection of such ovens and chimney, and such use thereof by the Company.

[The bill then set out a letter, written by the solicitor of the plaintiff to the solicitor of the Company, dated the 31st of October, 1837, stating the apprehensions entertained of the injury likely to arise from the coke-works then erecting, the answer of the solicitor of the Company thereto, and a further correspondence between the respective solicitors on the same subject, in the months of June and July, 1838, which, however, ended in no satisfactory arrangement].

The bill prayed, that the London and Birmingham Railway Company may be restrained, by the order and injunction of this Court, from using the said ovens, or any or either of them, and from burning the coke, and from quenching the same, when in a heated and burning state, in manner aforesaid, and from using the said ovens and chimney, or any or either of them, in manner aforesaid, or so as to injure the health of the plaintiff and his family, or so as to cause any injury, damage, or nuisance to the plaintiff in his trade or business, or to his said dwelling-house and buildings, workshop, wharf, and premises, or any part thereof, or the goods, wares, and merchandise thereon, or any part thereof; and from doing or committing any act, matter, or thing, in or upon their said lands and premises,

so as to annoy or be a nuisance to the plaintiff and his family, or to his said dwelling-house, buildings, workshop, wharf, and premises, goods, wares, and merchandise, or any part thereof respectively; and for further relief. The affidavits on both sides were chiefly directed to three points.

1st. The unwholesome nature of the coke works, and their injurious effect on the health of the plaintiff and his family.

2nd. The injury to the due enjoyment of the dwelling-house of the plaintiff, and the general deterioration of his stock in trade and effects.

3rd. The increased danger of fire to the premises of the plaintiff, arising from the proximity of the works.

On the first point, the plaintiff adduced affidavits of J. Elliotson, M. D., W. Hering, J. Clarke, and J. Wright, surgeons; of J. G. Children and A. Garden, operative chemists; and of other persons, to prove, that the making of coke is an imperfect species of distillation of coal, wherein coal and sulphureous gases, and other gases, must necessarily be evolved, and, in fact, are evolved from the ovens in question: that this produces an atmosphere prejudicial to human health; and that the health of the plaintiff and some of his family has been injured, and is likely to be further injured thereby. The defendants adduced counter-affidavits of H. S. Roots, M. D., and W. Lawrence, surgeon, of A. Ure, M. D., chemical engineer, I. T. Cooper, chemist, and of the foreman and three workmen engaged in the coke works, and other persons, and a written opinion of T. Brande, chemist to the Royal Mint, to prove that the operation of making coke, as performed by the Company, is in no respect a species of distillation of coal, but, on the contrary, a complete combustion of its volatile principles; and that no coal gas, or analogous gas capable of sensible recognition, can escape unconsumed into the atmosphere. That no product is evolved therefrom differing from that of a parlour fire: that the operation of coke-burning is not an

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unhealthy occupation: that the offensive smell and impure atmosphere, complained of in this case, were not perceived or felt; and that there was nothing in the process employed by the Company capable of injuring the health of the plaintiff or his family.

In answer to some of these representations the plaintiff deposed, that the causes of complaint occurred at uncertain intervals, and were not in operation at the time the works were visited by Drs. Roots and Ure, and Mr. Lawrence.

On the second point, the plaintiff adduced affidavits of nine persons to prove the obnoxious effects of the process of making coke: the offensive smell arising therefrom, and the large bodies of vapour, dense black smoke and dust, or fine ashes, blown from the ovens, upon the premises of the plaintiff, and the particular results therefrom. One of such persons, J. B. Boulting, ironmonger, deposed, "that such vapour is injuring and rusting all the iron work about the premises of the plaintiff, and, in the opinion of the deponent, in the course of six months the greater part thereof will be destroyed, or rendered useless: that, on one occasion, when in the plaintiff's drawing-room, he opened the window, and the room began to fill with steam or vapour from the coke, so as to compel him immediately to close it again."

The defendants adduced the counter-affidavits of several persons, which either denied the existence of the obnoxious effects complained of, or attributed them to other causes. One of such persons, J. C. Prior, deposed, that he prepared the plan for, and superintended the building of the coke-ovens, and has had the entire management thereof: that such ovens are constructed upon an entirely new and improved principle, so as to avoid any nuisance from smoke or gas: that such ovens are in two parallel rows, at a distance of about six feet, and the flues from each oven rise at the back, and are connected immediately with an horizontal flue, built over the crown of each oven, which is connected by a circular end at the extremity of each row,

and is attached to the chimney or shaft, which is 115 feet in height.

That, in the process of coking, the coal is allowed to burn or calcine for a period of forty-eight hours; and the practice is, to charge the ovens with coal alternately, in such manner that the coke in the alternate kilns is in a state of pure fire or red heat, and so that the smoke or gas, arising from the other alternate ovens, which are in a less advanced state in its passage over the pure fire, is immediately consumed; and the quantity which passes into the chimney or shaft is so small that not more is emitted therefrom than from an ordinary kitchen chimney, and that at an elevation of 115 feet: that occasionally, and whilst fresh coal is being put into the ovens, there is some escape of smoke from the mouth of the ovens to a small extent, but the same is of short duration, and does not happen more than once in the day.

With regard to the third point, J. Johnston, the solicitor of the plaintiff, deposed to the fact of the Sun Fire Insurance Office having materially increased the rate of the insurance on the premises and stock in trade of the plaintiff, owing to the proximity of the coke-works; and R. Freeman deposed to the occasion of the chimney of the coke-works taking fire on the 19th of June; and to the fact of the danger occasioned by the flakes of fire falling upon the premises of the plaintiff.

On the part of the Company, several of their engineers and workmen, by their affidavits, deposed, that the fire referred to was not attended with any danger, and was extinguished without difficulty, by merely opening a door, constructed in the base of the shaft or chimney, which can be immediately done, and which, having been explained to the workmen, the circumstance is not likely to occur again, without gross neglect.

Two persons deposed, as to their residences and stock in trade being in the immediate proximity of coke-works, and

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to paying only the ordinary rate of insurance from fire thereon. There were also affidavits of other persons, denying the existence of any increased danger of fire, owing to the proximity of coke-works.

In addition to the points mentioned, Mr. R. Stephenson, the principal engineer of the Company, and others of their engineers and officers, deposed, that the coking works are essential to the due carrying on of the business of the Company, inasmuch as there is no other source in the metropolis from which an adequate supply of coke, suitable for working the locomotive engines of the Company, can now be procured; and if such works be put a stop to, it will cause very serious public inconvenience, inasmuch as, for a considerable time, and until some new means can be devised for procuring an adequate supply of suitable coke for working the engines, it will be impossible for the mails and other public conveyances of the Company to be conducted with due regularity.

The plaintiff moved for an injunction in the terms of the prayer of the bill.

Mr. *Knight Bruce* and Mr. *Stinton*, in support of the motion.

Mr. *Jacob* and Mr. *Booth*, contra.

14th August.

THE VICE-CHANCELLOR.—It is obvious to me, that this Court must interfere. The plaintiff and the deponents, on his part, allege positive mischief; and they describe it in various instances. Where some individuals allege that a thing exists, and other individuals of equal credibility allege that it does not, *cæteris paribus*, the weight of evidence is certainly in favour of those who assert the affirmative. I shall apply that rule to this case. Here several persons allege an evil to exist: and others give very fair testimony that they do not think that it does exist. One

party may have perceived it, and the other may not. But that is not the whole case upon these affidavits. The defendant's evidence admits those things of which the plaintiff complains, representing, however, that they exist in such minute quantities, that, practically, they need not be regarded. But observe Mr. Prior's affidavit. [His Honor read the affidavit]. So that he unequivocally admits, that there is an escape of smoke, not merely from the mouth of the ovens, when the coal is put in, but also an escape of smoke from the chimney. Then he says, that the statement of the plaintiff, about the ignited cinders, is wholly fallacious; for that the soot in the chimney has only once taken fire. Therefore, this affidavit distinctly admits, not merely the escape of the smoke from the ovens at a certain time, but also the very fire of which the plaintiff complains, and the lodgment of the soot in the chimney. I do not find it stated in any of the affidavits, that the ignition in question happened from gross neglect; and Mr. Stephenson puts it hypothetically, "that it must have arisen from accident;" and adds, "it is not likely to occur again." None of the affidavits of the workmen state it to have been the result of accident. The workmen say, that "the soot in the chimney of the coke-ovens is not more likely to take fire than any other chimney." But it is a thing well known, that the soot in any other chimney is likely to take fire. The joint affidavit of Mr. Fox and Mr. Bagster admits the existence of smoke, and vapour, and smell; and, in speaking of the fires, the deponents say, "that all the fires within the ovens are inclosed by strong iron doors; and the smoke and gas being, in consequence of the construction of the ovens, almost entirely consumed before entering the chimney, there is no danger of sparks, or any inflammable matter, escaping in that direction." It is observable, that all these affidavits are made by persons either constantly or occasionally employed by the Railway Company, and who, therefore, would naturally feel

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a bias in favour of those who employ them. I do not impugn the fairness or veracity of their testimony, but it is natural that persons should be greatly influenced towards those who oblige them, and be liable to view the case of those persons in the most favourable light. Then, there is the affidavit of Mr. Freeman, who seems quite a disinterested witness. [His Honor read the affidavit].

It appears unquestionably from this testimony, that the fire not only happened, but, also, that it lasted a considerable time, and was attended with an emission of sparks, very different from those of which the workmen speak, and my opinion is, that no reason is assigned why the fire should not happen again, and in all probability it will happen again, from the very fact that Mr. Prior himself has intimated; namely, "that his apparatus should entirely consume the smoke;" but it does not consume the smoke, which is so collected and turned into soot in the chimney, as thereby to produce that effect which no witness altogether denies.

When I find this sort of explanation given about the fire, I am very much tempted not to rely entirely on the qualification and explanation which is given to the other subjects in dispute; and I must say, it has always appeared to me, from a very early period since I have been in the profession, to be a most extraordinary thing, that medical and scientific men, when opposed as witnesses in a cause, do swear in direct opposition to each other. I remember in the case of Lady Dorothea Campbell and her children, there were eight medical affidavits on the one side, and eight on the other, and I took the opportunity myself of seeing some of the children, and their appearance satisfied me, that there must have been something very extraordinary pervading the minds of the medical men on one side. It seems to me, that what is stated here about the fire, and the smoke, and the smell, does shew that there must be a very considerable annoyance to the plaintiff, beyond what

the defendants can fairly justify, and I cannot but think that the affidavit which is made by a person who seems to be quite disinterested, goes to establish the fact. [His Honor read Boulting's affidavit].

Now, here is a witness speaking positively of a fact, and it is nothing for other persons to say, the quantity of smoke and vapour was very small: here is a person who merely opened the window, and, in consequence of the room almost immediately filling with smoke and vapour, was compelled to shut it again. It appears to me, therefore, that the defendants never can be permitted so to carry on their method of cooling the coke with water as to produce this effect; at the same time I think it would be extremely desirable that some plan of alteration should be agreed upon, for there is great weight in the affidavits on the part of the Company, namely, that they are to a certain extent working for the benefit of the public.

I do not think that the plaintiff has been in fault with respect to the matter of delay. On the 31st of October he wrote to the Company, stating his apprehension that the works they were going to erect might turn out to be a nuisance. On the 26th of April, ten ovens I think were constructed, and have ever since been in work, and though he might have anticipated that the nuisance would be great, yet it did not necessarily follow that it would be so; and, therefore I can understand that there would be some degree of forbearance shewn on the part of the plaintiff. On the 19th of June this fire happens, and on the 26th the plaintiff writes a letter, to which he receives an answer on the 29th; and he writes another letter on the 29th of June, to which he receives an answer most deliberately written after consultation with the directors, on the 11th of July. In the meantime, the Sun Fire Office had refused to insure his tenement at the same premium as they had formerly done. I do not lay any great weight on that, because, if the Sun Fire Office had reasons for it, they

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would, of course, adhere to the safe and prudential side, after sending their surveyor or some officer of their own, not attending to what they might hear from others. The bill is filed on the 4th of August, and it takes some time, in order that the case may be stated, not only intelligibly, but fairly, and that the affidavits may be filed; therefore, it appears to me, that the plaintiff has not deprived himself of the interference of this Court by any remissness on his part. Perhaps it might have been better if he had endeavoured to arrange with the Company the mode of constructing this building; but it does not follow, that, because he did not then do so, he will not now, especially as he will have to establish the fact at law, that there is this nuisance. I must, therefore, grant the injunction; but I cannot follow the exact words of the prayer of the bill; and inasmuch as it is stated to me, that it will require forty-eight hours before the fires in the ovens can be extinguished, the injunction is not to be put in force before the expiration of that time.

The minute of the order was:—"That, from and after —— next, the defendants, their workmen, and servants be restrained from using, in the manner heretofore adopted, the ovens and chimney in the plaintiff's bill mentioned, or any or either of them; and from burning coke, and quenching the same when in a heated and burning state in such manner; and from using the said ovens and chimney, or any or either of them, in any manner so as to cause any injury, damage, or nuisance to the plaintiff, until the further order of this Court. The plaintiff is to bring such action as he may be advised. Reserve further directions and costs, and liberty to apply."

The defendants appealed from this order, and the appeal was heard by the Lord Chancellor at the latter end of August, 1838.

Mr. *Jacob* and Mr. *Booth*, for the appellants, the Company.

Mr. *Knight Bruce* and Mr. *Stinton*, in support of the order of the Vice-Chancellor.

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THE LORD CHANCELLOR.—It may possibly turn out that this is a nuisance in the legal sense. It is well known that those who live in the neighbourhood of towns are liable to inconveniences against which they have no remedy; but it is quite clear, if I believe the affidavits of the defendants, that there is here no nuisance, and it is also quite clear, if I believe the affidavits of the plaintiff, that there is a nuisance. I am asked by the plaintiff to conclude upon these conflicting affidavits, that this is such a nuisance that he is entitled to have it abated, and that the Company are not to be at liberty to go on with their works. The jurisdiction of this Court is not an original jurisdiction; it exists not for the purpose of trying a question of nuisance, but for the purpose of giving effect to a legal right after that legal right has been established. A party who comes here is bound to give some satisfactory reasons why he comes into a court of equity in the first instance, and why he does not, in the first instance, go to the ordinary tribunal. I see no reason whatever why, at the present moment, if this be a nuisance, and the plaintiff be entitled to a verdict, he does not come with a verdict establishing that fact. He thinks proper, for some reason, to delay it during the time in which he might have obtained legal proof of the existence of a nuisance; and he comes here for the purpose only of protecting his legal right. He applies to the Court of Chancery, in the first instance, to stop the defendants' works until he has had the opportunity of establishing it;—that is quite inverting the order of things. The reason assigned for it, however, is, that he was not able to anticipate all the evil that might be sustained. The works were commenced in September, 1837, and came into active operation before the end of April, 1838, and now we are at the end of August; and I suppose, in the course of August, the

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application was made to the Vice-Chancellor for the injunction. No step whatever was taken to assert this legal right. The plaintiff has mistaken his remedy. When he found the nuisance became such as, in his opinion, entitled him to redress, he should have brought his action, and then there would have been a verdict, and if that verdict was satisfactory, this Court would have protected his legal right; but he is coming here, in the first instance, and asking the Court to decide, upon conflicting affidavits, the question of nuisance or no nuisance. If it turned merely on that, it would be impossible for the Court to come to a satisfactory conclusion; but it does not turn on that, because the party who, by his delay, has prevented the legal right being ascertained as it ought to have been, must, if there is any inconvenience from it, be the party to submit to that inconvenience. Assuming inconvenience to the plaintiff to exist, there can be no comparison between the inconvenience that will result from withholding or granting the injunction, considering the enormous expense that has been incurred in erecting these buildings and works, which are necessary for carrying on the business of the railway. The order, as it stands, would stop all that until such time as the plaintiff ascertains, at law, whether he has a legal right to complain or not; whereas, withholding the injunction until he comes with a verdict establishing his legal right, has merely the effect of continuing the inconvenience which he has voluntarily submitted to from April until he applied for the injunction, and that without taking any step whatever to assert his legal right. I think, not only the conflicting affidavits make it impossible to support the injunction, but I think the party has precluded himself from asking for it by the delay which he has himself occasioned.

The injunction must be dissolved certainly; but the order which ought to have been made is, that the plaintiff may be at liberty to bring an action, the motion in the meantime to stand over, the costs being reserved, and,

when the jury have given their verdict, the plaintiff will then come or not, according as he may be advised.

It will be very difficult ever to obtain an injunction from me in a question of this sort, unless the plaintiff can shew that he could not have got a verdict before he came.

There is a great deal in what Mr. *Jacob* said, that, in the one case, the injury is irreparable; if the plaintiff is wrong, the Company have no redress: whereas an action will compensate the plaintiff for the injury he may sustain. It is said, no damages will compensate the loss of health; but there will be an assessment of damages for that, if the fact be proved.

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THE COMPANY of PROPRIETORS of the NAVIGATION of the RIVER DUN v. THE NORTH MIDLAND RAILWAY COMPANY. *October 19th, Nov. 22nd, Dec. 22nd.*

THE bill stated, that the plaintiffs are the Company of Proprietors of the Navigation of the river Dun: that, by A Company were im-
powered by
act of Parlia-
ment to take
lands for the
formation of a
Railway, and to deviate to the extent of one hundred yards from the line laid down in their map, provided such deviation was made within two years from the passing of the act, and which two years would expire on the 4th of July, 1838.

In January, 1837, a deviation in the line, within the prescribed limits, was made.

A subsequent act, passed in May, 1837, enacted that the time by the first act limited for the compulsory purchase of lands should be enlarged for the term of one year, but providing that no deviation from the line laid down should be made after the expiration of the period by the first act limited.

The Railway Company having, subsequently to the 4th of July, 1838, given notice to certain owners of lands on the line to which they had deviated in January, 1837, of their intention to take the lands under the powers given by the acts, on a motion for an injunction to restrain the Railway Company from so proceeding to obtain possession, on the ground that the Company, having allowed the time limited by the first act to expire, had no power to take the lands by compulsory process:—*Held*, by the Vice-Chancellor, that the plaintiffs not having shewn that irreparable mischief would result from the proceeding of the Company, an injunction could not be granted.

Held, by the Lord Chancellor, that where it is clearly shewn that a public Company is exceeding its powers, this Court cannot refuse to interfere by injunction. That the Company having, previous to the expiration of the two years limited by the first act, and previous, also, to the passing of the second act, deviated within the authorized limits from the line laid down in the map, the second act must be construed to give them an enlarged period of one year in which to exercise the power of taking the land in the line to which they had so deviated.

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two acts of Parliament, one made in the 12th year of the reign of George the First, intituled, “ An Act for making the river Dun, in the West Riding of the county of York, navigable, from Holmstile, in Doncaster, up to the utmost extent of Tinsley, westward, a township within two miles of Sheffield ;” and the other made in the 13th year of the same reign, intituled, “ An Act for improving the Navigation of the river Dun, from Holmstile, in the township of Doncaster, in the county of York, to Hilsick House, in the parish of Barnby Dun, in the said county,” the master, wardens, searchers, assistants, and commonalty of the company of cutlers, in Hallamshire, in the county of York, and the mayor, aldermen, and burgesses of Doncaster, respectively, and their respective successors and assigns, were nominated and appointed undertakers of the said navigation between such before-mentioned places, with certain powers in the acts mentioned. That, by another act of Parliament, made in the 6th year of the reign of George the Second, intituled, “ An Act to explain two Acts of Parliament, one made in the twelfth, and the other in the thirteenth year of his then late Majesty, George the First, for making navigable the river Dun, in the county of York, and for the better perfecting and maintaining the said Navigation, and for uniting the several Proprietors thereof into one Company,” it was enacted, that the undertakers of both of the said navigations, their several and respective successors, heirs and assigns, should, from the 24th of June, 1733, be united into one Company, for the better carrying on, maintaining, and perfecting the said navigation, and should be a body corporate, by the name of “ The Company of Proprietors of the Navigation of the river Dun,” and by that name might sue and be sued.

That by an act of Parliament, made in the 6th and 7th years of the reign of William the Fourth, intituled, “ An Act for making a Railway from Leeds to Derby, to be called the North Midland Railway,” it was enacted, that certain persons therein named, their several and respective

successors, executors, administrators, and assigns, should be a body corporate, by the name and style of "The North Midland Railway Company," and by that name might sue and be sued.

[The bill then stated certain clauses in the act, being clauses in the form commonly used in acts relative to railways; namely, section 5, empowering the Company to make and maintain the railway in the line delineated on the plan, and described in the book of reference deposited with the clerks of the peace for the county of Derby and the West Riding of the county of York; section 10, providing for the custody of such plans and books, and for reference thereto by all persons interested; section 14, empowering the Company to treat for the purchase of any lands authorized to be taken by them, and of all interests therein; section 32, for the impannelling of juries to assess the value of the land, and the damages, where the owners, occupiers, or persons interested therein, shall refuse, or be incapable to treat for the purchase thereof, and rendering the verdict of such juries conclusive. Section 53, enabling the Company, upon payment or tender, as therein mentioned, of the purchase-money agreed upon or assessed, to enter upon such lands, and declaring, that thereupon the fee simple and inheritance of such lands, and all the estate therein, should thenceforth be vested in, and become the sole property of the Company for the purposes of the act; section 106, saving to the Company of Proprietors of the Navigation of the river Dun, all the rights, privileges, powers and authorities vested in them; section 230, enacting that, unless the Company should, within the space of two years, to be computed from the passing of the act, agree for, or cause to be valued, and paid for as therein mentioned, the lands which they are thereby empowered to take or use, then and from thenceforth the powers which are thereby granted to them for taking or using such lands should cease, and be utterly void, save and except with the consent in writing of the owners and occupiers thereof respectively.]

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That the last-mentioned act was passed on the 4th of July, 1836. That, by another act of Parliament, made in the 7th year of the reign of William the Fourth, intituled, "An Act to enable the North Midland Railway Company to alter the Line of the said Railway, and also to make two Branches to communicate with the same," the Company were empowered to make certain alterations in the line of railway authorized by the act of the 6 & 7 Will. 4, and all the powers, authorities, privileges, and directions which, by that act, are given for making and maintaining the portion of the original line of railway, by the present act authorized to be abandoned, were, from and immediately after the making of such alterations, made to cease and determine.

That sect. 4 of the now stating act, after reciting that plans and books of reference, describing the line of the intended alterations of the railway, had been deposited with the respective clerks of the peace, provides for the custody of the same, and reference thereto, as was provided in the former act, with regard to the original maps and plans. That sect. 22 enacts, that the time by the act 6 & 7 Will. 4, limited for the compulsory purchase of land, for the purpose of the undertaking, should be extended and enlarged for the further term of one year, to be computed from the time by the said act of the 6 & 7 Will. 4 limited: provided that it should not be lawful for the Company to deviate from the line of railway, as laid down in the maps deposited with the clerks of the peace, after the expiration of the period by the act of the 6 & 7 Will 4 limited for the purchase of lands, without the consent of the respective owners and occupiers thereof being previously obtained. That the branches, alterations, and deviations authorized to be made by the act 7 Will. 4 do not affect that part of the line of the railway which passes through the township of Brinsworth, in the parish of Rotheram, in the West Riding of the county of York, in which the two pieces of land hereinafter mentioned are situate.

That the plaintiffs are owners in fee simple in possession of the said two pieces of land, containing together about twenty-two perches, one portion of which, consisting of eight perches, adjoins the towing path, upon the south side, of a navigable canal, called the Holmes New Cut, part of the navigation of the plaintiffs, and is of value and importance to the support thereof, and of the banks and works of the same, and to the plaintiffs; and the other portion, consisting of the remaining fourteen perches, is on the opposite side, and forms a bank to the canal; and upon the last-mentioned piece of land a towing-path is also formed, for the purpose of passing along the north side of the navigation, when necessary. That no part of the twenty-two perches of land is in the line of the railway, as laid down on the maps deposited with the clerks of the peace for the counties through which the railway is intended to pass; and the plaintiffs have never sold, or contracted to sell, the said two pieces of land, or either of them, to the Company, and the Company had no power, and are strictly prohibited by the terms of the act of Parliament, from taking or using the same, or any part thereof, without the consent of the plaintiffs, as the owners and occupiers thereof, and which consent plaintiffs have never, in any manner, given. Nevertheless, the Company, on the 31st of July last, caused a notice in writing to be given to the plaintiffs, offering to them the sum of 30*l.*, as the compensation or purchase-money for the twenty-two perches of land, and stating, that the same were required for the purposes of the acts of the 6 & 7, and the 7 of Will. 4, or one of them; and the Company have set out the line of their railway, so as to pass over the said two pieces of land. That such notice of the two pieces of land being required by the Company, for the purposes of their undertaking, was the first notice given by them to the plaintiffs that the said pieces of land, or either of them, were or was required to be purchased or taken by them for the purposes of the undertaking.

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That, being advised that the Company could not, within the terms of the said acts of Parliament, take or use the pieces of land, or either of them, without the consent of the plaintiffs, as the owners and occupiers thereof, and feeling, as the fact is, that if the same are taken, great and irreparable injury will accrue to the navigation and to the plaintiffs, they refused, as they were entitled to do, to treat with the Company for the sale of the two pieces of land. That no further proceedings were taken by the Company to obtain the two pieces of land for some time; but they have lately issued their warrant to the sheriff of the county of York, to summon a jury, to assess the amount to be paid to the plaintiffs for the purchase of the said two pieces of land, and they intend forthwith to proceed therein, and to enter upon the said two pieces of land, and evict the plaintiffs therefrom.

The bill charged, that the Company, in taking the two pieces of land, would deviate from the line of railway as laid down upon the plans mentioned in the act of the 6 & 7 Will. 4. That the Company did not, within two years from the passing of the act 6 & 7 Will. 4, agree for or cause to be valued and paid for, as in that act mentioned, the said two pieces of land, or either of them; and that the plaintiffs did not, within the last-mentioned period, or at any time, consent that the Company should deviate from the line of railway as laid down on the said plans. That, upon receiving notice of the intention of the Company to have the purchase-money for the two pieces of land assessed, and to enter thereon, the plaintiffs protested against such proceedings, and also gave notice to the sheriff of the county of York of the illegal proceedings so threatened by the Company.

The bill prayed, that the Company may be restrained, by the order and injunction of the Court, from issuing or proceeding upon any warrant to the sheriff of the county of York, for assessing the purchase-money or consideration to

be paid for the said two pieces of land, and that it may be declared that, according to the terms of the acts of Parliament of the 6 & 7 and the 7 Will. 4, they, the Company, have no right or title to require or take the said two pieces of land, or either of them, or any part thereof, for the purposes of the railway undertaking, and that the Company, their servants, agents, and workmen, may be restrained from entering upon, or taking possession of the said pieces of land, or either of them, or any part thereof respectively, and that all necessary and proper directions may be given for effecting such purposes; and for further relief.

By sect. 57 of the act 6 & 7 Will. 4, (not stated in the bill), it is enacted, that the Company, in making the railway and other works by the act authorized, shall have full power and authority to deviate from the line delineated on the maps or plans deposited with the clerks of the peace, with such deviation in the section as may be necessary in consequence thereof: provided always, that no such deviation shall extend to a greater distance than one hundred yards, and, in passing through any city or town, such deviation shall not extend to a greater distance than ten yards from the line so delineated upon the said plans; nor shall such deviation extend into the lands or property of any person whose name is not mentioned in the said book of reference. By sect. 104, after reciting that the railway proposed to cross two several cuts or canals, and the towing-paths thereof, in the township of Brinsworth, belonging to the company of the proprietors of the navigation of the river Dun, it is enacted, that, for the purpose of carrying the railway over the said cuts or canals, and the towing-path thereof, the Railway Company shall build and maintain such bridges as are therein described, in such manner and form as not at any time, or in any way, or by any means to injure, prevent, or obstruct the free passage upon or along the said cuts or canals, towing-paths, or works thereto belonging.

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Affidavits were filed on the part of the plaintiffs, verifying the statements of the bill; and, by one of such affidavits, C. Bartholomew, the engineer of the Navigation Company, deposed to having made certain admeasurements and comparisons in the intended line of railway, as laid out and delineated, and he thereby found, that the line of the railway, as set out in the map attached to the notice of the 4th of October, to pass over the two pieces of land, differed from the line of the railway as laid down on the map deposited with the clerk of the peace, under the first act, by not less than fifty yards.

On the 19th of October, 1838, a motion was made for an injunction, in the terms of the prayer of the bill, before the Master of the Rolls, (sitting for the Vice-Chancellor), and an order was then made, that the motion should stand for the first day of Michaelmas Term, the defendants undertaking not to proceed to assess the value of the land in question upon the notice of the 4th of October.

The defendants filed affidavits, and, by one of such affidavits, H. Vickers, the solicitor of the Company, deposed, that in and previous to the month of August, 1837, the Company had made preparations, by contracting and otherwise, for carrying the railway over the canal and towing-path belonging to the plaintiffs, called the Holmes New Cut, by means of a bridge, in pursuance of the 104th clause of the first act, and they had, by means of stakes and cuttings upon the ground where such bridge was intended to cross, set out and described the direction in which it was intended to cross.

F. Swannick, engineer, deposed, that, in December, 1836, he determined upon, and caused to be set out, the precise line of the railway, and caused stakes to be driven into the ground to denote the centre of the line, and one of such stakes was placed in the centre of the piece of land on the north side of the Holmes Cut: that the line so set out is a deviation from the line delineated on the map deposited

with the clerk of the peace, but is within the limit of deviation authorized by the act: that the plaintiffs could be under no misapprehension as to the course of the deviated line, inasmuch as the whole of the land required was marked out by furrows in the ground previous to the 1st of January, 1838, denoting thereby the land required for the purposes of the railway: that it is not essential to the execution of such bridge and works that the defendants should become the purchasers of the soil of the two pieces of land, provided they can have the possession thereof, and of the necessary part of the canal and towing-path, for a sufficient time, and in such manner as will enable them to complete such bridge and works.

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The motion was on this day renewed before the Lord Chancellor.

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Mr. *Wakefield* and Mr. *Kenyon Parker*, in support of the motion.—[His Honor directed the attention of counsel to the question of damage as the ground of jurisdiction.]—The damage apprehended in this case is twofold,—first, the Company intend to destroy land which is the property of another party;—secondly, there is a towing-path on one side of the river, the banks of which will be destroyed by the cutting away of these pieces of land. It is admitted that the intended works will narrow the navigation; but it is said, that such a proceeding is authorized by the 104th section of the first act:—no such authority is given where the Company have no power to take the land, and, consequently, no power to cross the canal at that point.

Irreparable injury may be caused. By the 53rd section it is enacted, that, immediately upon the value of the land being assessed by a jury, the parties may, upon tender of the money, take possession of the land;—the act immediately transfers the legal estate to the Company, and creates a mischief remediable only by a Court of Equity.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Bacon*, against

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the motion.—The Company are merely about to make a bridge pursuant to the 104th section of the act. No particular statement of either the nature or magnitude of the damage has been pointed out, but the case is suffered to rest upon a general complaint of damage. It has been said, that a party has a right to come to this Court to protect his soil capriciously; but it is not every trifling invasion of a legal right which will induce this Court to interfere. Here, according to the case made, an injunction would amount to a prohibition of a trespass.

It is said, that, as soon as the jury have assessed the value of the land, and a tender of the purchase-money has been made, the Company may enter; but it is not so: if they have not a legal right to enter, they will be trespassers. Unless the land is within the act, the verdict of the jury can have no operation on the legal estate in the land. The narrowing of the navigation is expressly authorized by the act: it is only as to purchasing lands that the Company is limited. The powers of the Company are twofold; one, of purchasing, as to which the time is limited, and which may or may not apply to this case; the other, a totally distinct power, as to which there is no such limit:—that is, the power to cross and narrow canals and navigations, and amongst others this navigation. It is only intended to narrow this navigation to the extent authorized by the act. Under the act, the Company can cross without purchasing. No injury will be done to these pieces of land:—there is no timber upon them. This is a pure question of law, and ought never to have been brought into a court of equity.

Mr. *Wakefield*, in reply.—The plaintiffs are the owners of the land in question. It may in one sense be said, that no irreparable injury will be done, because money may compensate it; but this Court does not view questions of this kind in that light.

VICE-CHANCELLOR.—If the act of Parliament authorizes

the Company to cross, and thereby interfere to a certain extent with the navigation, and it be true, that the Company are not to cross the navigation at any spot, other than that which the act points out, then, the plaintiffs have to shew, how the crossing of the navigation at the place proposed, is a material injury to the navigation beyond that which would have been occasioned, if the Company had crossed the navigation at the spot authorized by the act. I see no evidence of such injury, and I cannot comprehend what it is. Before I can interfere, I must have it shewn to me, that there is something in the nature of irreparable spoil or waste, something more than a mere trespass. If the Company are crossing the navigation in a manner merely contrary to law, the plaintiffs have a remedy at law. It is insisted, that they are crossing it in an illegal manner connected with irreparable injury, which this Court ought to prevent in the first instance; the affidavits in support of the injunction should have gone into particulars, so as to enable me to see this. Supposing the construction of the act of Parliament to be as the plaintiffs contend, the utmost of the case amounts to this, that, according to the true construction of the act, having regard to the lapse of time, the Company are not authorized to cross over or take these two pieces of land; but the plaintiffs must go further, they must shew that the taking the two pieces of land, in the way in which of necessity the Company would have to make use of them, would produce irreparable mischief.

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The motion was refused without costs.

From this decision the plaintiffs appealed.

Mr. *Wakefield*, Mr. *Wigram*, and Mr. *Kenyon Parker*, in support of the appeal motion.—By the terms of the 22nd section of the second act, no deviation from the line

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of railway, laid down on the maps, accompanying the first act, can be made after the expiration of the period limited by that act for the purchase of lands, without the consent of the respective owners and occupiers. The defendants have allowed that time to expire, and they cannot now deviate without the consent of the plaintiffs, and such consent is expressly refused.

Conditional powers in these acts are to be construed strictly; by them it is that safeguards are given to the individuals whose lands are to be dealt with. In *Blakemore v. The Glamorganshire Canal Company (a)*, Lord Eldon says, "When I look upon these acts of Parliament, I regard them all in the light of contracts made by the legislature, on behalf of every person interested in any thing to be done under them; and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they will become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous; and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament, do in effect undertake, that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else: that they shall do and shall forbear all that they are required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.

"It is upon this ground that applications are frequently made to stay operations, where a canal is in the progress of formation. In such a case, it may be of very little consequence to A. B., whether the canal is brought to his lands through the lands of C. D. or through those of E. F.;

(a) 1 Myl. & Keen, 162.

nevertheless, if the legislature has said the canal shall be brought to the lands of A. B. from the lands of E. F., and not of C. D., this Court would never permit the parties to bring the canal to the lands of A. B. from the lands of C. D.: the parties are obliged to submit to the contract which the legislature has made for them. The result is, that the contract shall be carried into execution; and the king's subjects are compelled to submit to it, upon the notion that it will be for the public good; but they are not compelled to submit to any thing except what the legislature has said shall be done. I have therefore stated, and I have already more than once acted upon the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress; and for this reason, that a man may have a great objection to a canal being made in one line, which he would not have to its being made in another; and particularly, he might feel that objection in a case where parties, after obtaining from the legislature leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A. B. that the canal should come through the lands of C. D. than through those of E. F.; but to that my answer is, that you have bargained with the legislature that you shall do the act they have authorized you to do, and no other act."

In *Lee v. Milner* (a), Baron *Alderson* says, with regard to this point, "I have had occasion before to consider the law on this subject, and I think it may be stated thus:—These acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by parliament to take the land of the different

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proprietors through whose estates the works are to proceed. Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else. This I conceive to be the real view taken of the law by Lord Eldon, in the case of *Blakemore v. The Glamorganshire Canal Company*."

The first notice given by the defendants applied to the fourteen perches only; and, though it is stated in one of the affidavits of the defendants, that negotiations went on for a period of ten months, yet, in December, 1837, distinct notice was given that the plaintiffs would not treat for the sale of the lands, and it was not until the 31st of July, four weeks after the time limited by the first act had expired, that the amended notice or offer for purchase of both pieces of land was given.

If, then, the compulsory powers of taking the land have expired, this Court will interfere to prevent the defendants taking possession of the lands in question.

It has been said, that this Court will not interfere in such a case, unless it be clearly made out that irreparable mischief will result from the act of taking possession; but such is not the practice of the Court. A party is not to have his land taken against his will upon any pretext; and this Court will protect it.

Mr. *K. Bruce*, Mr. *Jacob*, and Mr. *Bacon*, contra.—The question is purely a question of law, and not of equity. If the defendants are right in point of law, and have a right to take possession in the way they are proceeding to do, this Court cannot restrain them from doing so;—if they are wrong, the remedy of the plaintiff is by an action either of trespass or ejectment. If the time during which a jury

may be summoned has legally expired, any assessment or process of a jury will be a nullity. The Court would, in interfering by injunction, in effect, be trying an action of ejectment.

Lord *Petre's case* has decided this point; there the injunction was granted on the express ground, that the time for summoning the jury had not expired; here it is said the time has expired, the remedy is, consequently, at law; and the Court will in such a case only interfere, where it is clearly shewn that, before the question can be decided in a court of law, irreparable damage will ensue to the plaintiffs. The affidavits of the plaintiffs shew no specific act of irreparable damage.

In August, 1837, a notice, with a plan attached, was served on the plaintiffs, shewing the line of the railway as intended to be carried across both banks of the canal; and thus the plaintiffs were fixed with notice of the deviated line.

The 230th clause only applies to the case of lands which the defendants are under the necessity of purchasing. Under the 104th clause, the Company can cross the navigation without purchasing; unless, therefore, they are bound to purchase these lands, the 230th clause has no application.

The deviation from the parliamentary line had been made before the second act passed, the 22nd section of that act, therefore, does not apply.

Mr. *Wakefield*, in reply.—The plaintiff is not seeking to prevent the trial of a legal question, but to prevent the subject-matter of the trial being destroyed before a decision of the legal question can be obtained.

Under the act, the sheriff may, immediately upon assessment of the value of the land by a jury, and a tender of the sum assessed, put the defendants into complete legal possession. The plaintiffs are not called upon to define the

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exact line between reparable or irreparable damage; it is sufficient to shew that there will be an alteration of the property.

It is said, that, in the summer of 1837, the plaintiffs had notice of the proposed deviation in the line, and that these lands would be required for the deviated line; at that time the compulsory powers under the act existed; and, therefore, they could not have opposed the taking of the lands. Supposing the plaintiffs to have known of the acts alleged, in the affidavit of Swannick, to have taken place, those acts do not constitute a deviation, but amount merely to an indication of an intention to deviate. The defendants might have returned to the original line.

In *Lee v. Milner (a)*, the undertakers of the Aire and Calder Navigation were empowered by act of Parliament to make a canal and tram-road leading therefrom, and fifteen years were given to them to complete the works. At the expiration of nearly four years from the passing of the act, having completed part of the canal, and having marked out the tram-road, they gave notice, pursuant to the act, to the owners of a certain spot of land, of their intention to purchase it for the purposes of the tram-road: the landowners resisted the purchase, on the ground that the undertakers had deviated from the parliamentary line in the construction of their canal; but it was held, that, as the undertakers did not admit any intention to abandon the original line, and there remained ten years in which they might complete their works, the objection was untenable, and that the landowners were bound to shew, that the undertakers had not merely deviated for the present, but that they had finally abandoned the parliamentary line.

Dec. 22nd.

LORD CHANCELLOR.—The principal ground of this ap-

(a) 2 You. & Coll. 618.

plication, is a supposed illegality, in point of time, of the proceeding which the Railway Company have adopted, it being contended, that the time is passed in which they may take possession of and deal with the property, as property over which the act gives them power. It appears, that the original act, which received the royal assent on the 4th of July, 1836, confined their powers of taking lands to two years from the passing of the act, and there is no doubt that such, also, is the construction of the 57th clause. Then an act passed in the subsequent year, the 22nd clause of which contained a provision affecting that 57th clause of the first act. The second act authorized a new line as to part of the works, and it referred to the former act, and gave the same powers with regard to the new line, as the former act had given with regard to the line thereby prescribed; and such 22nd clause is as follows: [His Lordship read the clause]. Now, there are certain facts in the affidavits which are not disputed; namely, that, after the 4th of July, 1836, when the first act passed, and, as appears, so early as December in that year, the line of the railway was staked out, being an altered or deviated line, that is, not according to the parliamentary line, but within the power of deviation contained in the first act of Parliament, it being fifty yards only from the parliamentary line; and that, in the month of January, 1837, this line was marked by a furrow, and the same has ever since continued to be the adopted line. So that, in point of fact, a deviation took place at a very early period, which has continued to be the line which the Railway Company have acted upon from that time until the expiration of the two years. The Dun Navigation Company are the proprietors of two small pieces of land, one of fourteen and the other of eight perches, on the opposite sides of this navigable river, beyond the towing-path, forming, therefore, no part of the site of the water-way or of the towing-path, and this line

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so selected by the Railway Company, and so clearly within the powers given to them by the first act, was marked out and known to the Navigation Company. It must have been known, because it actually passed over their land: and the affidavits of the defendants state positively, (and I do not find it any where contradicted), that the plaintiffs did know of it so early, at least, as January, 1837. A negotiation took place as to the fourteen perches of land, and that negotiation not having ripened into a contract, in June, 1838, notice was given of going before a jury, for the purpose of ascertaining the value of those fourteen perches. At that time, for what reason it is not at all material, in my view of the case, to inquire, the Railway Company did not pursue their rights with regard to the eight perches of land on the other side of the river, and that piece of land was not included in the notice of June. On the 4th of July, being two years from the date of the royal assent being given to the first act, according to the argument for the Navigation Company, the power of the Railway Company to take the lands expired: on the 21st of July, and therefore, according to the Navigation Company, after the powers of the Railway Company had ceased, they gave another notice, in which was included the eight, as well as the fourteen, perches. If the powers expired on the 4th of July, 1838, they certainly had no right to proceed under the supposed powers of the act, for the purpose of taking the case before a jury, which, if within the authority of the act, upon the jury assessing the value, would give the Railway Company a right to enter upon these lands.

When I first looked at these two acts of Parliament, there appeared to me a question of some difficulty as to the effect of the 22nd clause of the second act, operating on the 57th clause of the first act. It was, however, argued, that there was conduct on the part of the Navigation Company, which would preclude them from coming to this Court for

relief, even supposing the law to be in their favour. Now, I have looked through all the affidavits for that purpose, and I can see no such case established against the Navigation Company. I can find no act of theirs, which was calculated to put the Railway Company off their guard, or to induce them to abstain from the exercise of any legal right which they possessed. They simply did nothing. They treated for the fourteen perches; that treaty did not succeed: whether the terms they required were unreasonable or not, it is not necessary to inquire, but, in point of fact, the negotiation proceeded for a considerable length of time, and then, of course, the Railway Company were put to the exercise of their legal right; and all that is shewn by the affidavits is, that the Railway Company mistook their legal right, if they were wrong in point of fact, [which remains to be considered], and did not give the notice in time. I do not find that any thing passed, which ought to have prevented the Railway Company from exercising their legal rights, within the time contended for by the Navigation Company, as the time limited.

The question, therefore, comes to this, whether, upon the case as made, it is so clear, that the time has gone by, and that the powers given by the act have ceased to exist, as to make it the duty of the Court to interpose to protect this property. I am not at liberty [even if I were in the least disposed, which I am not] to withhold the jurisdiction of this Court, as exercised in the first case in which it was exercised, that of *Agar v. The Regent's Canal Company (a)*, where Lord Eldon proceeds simply on this,—that he exercised the jurisdiction of this Court for the purpose of keeping these Companies within the powers which the acts give them; and a most wholesome exercise of the jurisdiction it is, because, great as the powers necessarily are, to enable the

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Companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there were not a jurisdiction continually open and ready to exercise its power, for the purpose of keeping them within that limit which the legislature has thought proper to prescribe for the exercise of their powers. On that ground I should never be reluctant to entertain any such application. I think it most essential to the interest of the public, that such jurisdiction should exist, and should be exercised whenever a proper case for it is brought before the Court, otherwise the result may be, that, after your property has been taken and destroyed—after your house has been pulled down, and a railway substituted in its place, you may have the satisfaction at a future period of discovering that the Railway Company were wrong. (It would be a very tardy recompense, and one totally inadequate to the injury of which the party has to complain; and individuals would be made to contend with Companies who often have vast sums of money at their disposal, and that, too, not the money of the persons who are contending. It is a most material point to consider, when you enter into a contest with an individual, whether he is spending his own money, or money over which he has a control, or in which he has comparatively a small interest. If these Companies go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers, interfere with the property of individuals, this Court is bound to interfere; that was Lord Eldon's ground in *Agar v. The Regent's Canal Company* (a), and I see no reason whatever to depart from the rule there laid down and acted upon; but then, of course, it must be a case in which the Court is very clearly of opinion, that the Company are exceeding the powers which

(a) Cooper's Rep. 77.

the act has given them. The case, therefore, is reduced to this, whether the 22nd section does, or does not operate on the 57th section, so as to extend the time within which the Railway Company were authorized to take land. It is contended, that the 22nd section must do something with regard to the power to take land under the first act; and of that there is no doubt; but then, it is said, that all the second act does, is to extend the time on the old line: that is most unlikely to have been the intention of the legislature, considering, as the Court is entitled to do, how the facts existed at the time the second act passed. The second act passed in May, 1837. In January, 1837, the Railway Company had altered their line. They had marked out the now existing line, at a distance of fifty yards from the parliamentary line, and, therefore, within the limit of their powers; and they have, ever since, acted upon the line so marked out. This was their line, therefore, in the month of May, when the second act passed. The act was obtained by them, and was designed to enlarge their powers, and it was impossible to suppose that it could have been their intention, or the intention of the legislature, to give them new powers over a line which they had abandoned, and to give them no power over a line which they had adopted. Now, the words are these: [His Lordship read the 22nd section of the second act.]

It follows, therefore, that they have enlarged powers for another year, from the 4th of July, 1838, to the 4th of July, 1839, but then they are not to deviate from the parliamentary line after the expiration of the two years prescribed by the first act. The question is, what is the meaning of the provision that they shall not deviate from the parliamentary line? Is it that they shall have these enlarged powers as to the original parliamentary line, which at the time when the second act passed they had entirely abandoned, or as to the line to which they had at

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that time deviated from the parliamentary line? From the state of facts existing at the time when this act passed, it is impossible to suppose that the Company meant to reserve to themselves the right of going back to the original line, and take no new powers with respect to that line which they had adopted in substitution of the original line; neither do I consider that such would be the right construction of the language of the section. The deviation must be considered as a complete act of deviation: taking one road instead of another, is immediately it is done, of itself a deviation. A ship is said to deviate from its given course, the instant any departure is made from that course. Here the Company have a right to go on the parliamentary line, or to deviate from it within the distance of one hundred yards. Having adopted a line which is a deviation from the parliamentary line, they then take powers under the second act, and the legislature says, they may have another year, but shall not deviate after the expiration of the two years; that is to say, the line which they selected when they deviated from the original line, shall, after the expiration of the two years, be the line to which they are fixed. They shall not alter their line after the expiration of the two years, but on the altered line, under the powers of the original act, they shall have extended powers for another year: this is the only rational construction, and it is the natural and obvious construction of the words themselves. Then, if the Company had deviated, and had adopted a new line within their original powers at the time when the two years expired, it seems to me, that they have now the power for another year of acting on the line to which they had thus deviated; I certainly think that such is the proper construction of the two acts, and, therefore, that the Navigation Company have not made out a case on which they can impeach the powers of the Railway Company to take these two pieces of land.

There was another point made on the argument, and in the affidavits ; but I do not find that it was ever brought forward during the contest, before the suit commenced ; namely, that the Railway Company are at liberty to take this land, not for the purpose of a purchase, but for the purpose of making a bridge over the navigation itself. I have looked through the clauses referred to in support of that proposition, and it does not appear to me that there is any pretence for it. The power of making bridges was over the navigation itself,—the water and the towing-path. The Company are authorized to take land not covered with water, and not being a towing-path, for the purpose of erecting bridges. A sketch was handed up to me, to shew what they intended to do ; it represented a raised viaduct on arches. The argument seems to assume, that, if you make a railway on arches, and not a fixed solid railway, you might go over the land of any person without paying any thing for it. The land in question is no part of the navigation or towing-path ; and the clauses which authorized the making bridges over the navigation and the towing-path do not affect the land, except what is comprised in the one or the other. I presume that the space which is made necessary to be preserved under the bridge is less than the present extent of the navigation and towing-path, and that they are undoubtedly doing that which these clauses authorize them to do. They have a right to throw a bridge over the towing-path and over the water, provided they keep within the width which the act of Parliament prescribes. The act certainly gives them no power to interfere with any land belonging to the Navigation Company which is beyond the limits of the bridge, or of the water, or of the towing-path, and here both pieces of land are beyond the towing-path. It is, therefore, I apprehend, quite clear that these clauses do not authorize such a use of the land, nor have they ever been supposed to do so. The Railway Company have gone

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altogether on the treaty which took place, and, in the notice they gave, they have considered their right as a right to purchase under the provisions of both clauses.

In this case, there is not that sort of doubt which would authorize me to put the parties to the expense of a trial at law. If, however, the Railway Company prefer to have the point at once decided, I will give them the opportunity of so doing. If they feel any doubt on the subject, and think it more to their advantage to have the question decided before they incur expense than afterwards, I will, if they desire it, frame an action which will enable them to try the question. If, however, they are willing to incur the risk on the construction of those clauses, I do not feel that there is sufficient doubt on the subject to authorize me, without their consent, to impose any terms for the purpose of now trying the question.

[The Counsel for the defendants intimated, that they did not desire any direction for a trial].

LORD CHANCELLOR.—I think, then, the Dun Navigation Company have failed in making out that the Railway Company are exceeding their powers; and, therefore, I must refuse the application for the injunction, with costs.

Between JOHN SPENCER and EDMUND WARD, Plaintiffs.
and

1836.

The LONDON and BIRMINGHAM RAILWAY

COMPANY, - - - - - Defendants.

*August 3rd,
4th, and 6th.*

THE bill stated, that the plaintiff, E. Ward, is possessed of, or well entitled to, a messuage, or coach-house and stable, situate in Granby Mews, for the residue of a term of 97 years, commencing from Michaelmas-day, 1829: that the plaintiff, J. Spencer, now holds and occupies the said messuage, or coach-house and stable, and premises, as tenant thereof, from year to year, to the plaintiff, E. Ward, at the yearly rent of 22*l.*, and carries on the business of a coach-master, or hackney-man, and livery and bait stable-keeper; and that he employs the said premises for the purposes of his trade or business, and was induced to rent and hold the same from their proximity to the Hampstead Road, and the advantage of the easy access therefrom to that road through Granby Street: that the plaintiff, J. Spencer, has derived great profit and advantage from the occupation of the premises, in consequence of the convenience of the situation, and the easy access therefrom to the Hampstead Road: that the only direct means of communication between Granby Mews and the Hampstead Road is through Granby Street, and that the said access through

A Railway Company were empowered to cut through public or private roads, provided that if the same should be thereby rendered impassable or inconvenient for the persons entitled to the use thereof, the Company should previously cause another sufficient road to be made instead thereof, and equally convenient, or as near thereto as might be. On the 1st of June, the Company, as it was alleged, had completely cut through a certain public road without having complied with the provision of

the act, by previously causing such a substituted road to be made, whereby the plaintiffs sustained special damage.

On the 25th of June the plaintiffs filed their bill, praying an injunction to restrain the Company from continuing to cut through or stop up the road, and for other relief.

Held, by the Vice-Chancellor on demurrer, that individuals who suffer a special damage from a public nuisance, may sustain a bill to be relieved therefrom, without the Attorney-General being a party to the suit.

Held, by the Vice-Chancellor, on a motion for an injunction, that, in the case stated, the Court will not only restrain the further cutting of the road, but injoin the Company from continuing to stop up the same, and thereby compel them to restore it to its original state.

Held, by the Lord Chancellor, that the plaintiffs being injured by the conduct of the Company, in exceeding the powers conferred upon them by the act, were entitled to the most effectual remedy within the power of the Court; and, in this case, it appearing that the road would be restored in a shorter period of time by permitting the Company to complete their works than by enforcing the terms of the order, the injunction was, with the assent of the plaintiffs, suspended for three weeks, to afford time accordingly.

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Granby Street into the Hampstead Road is of great use and convenience to the plaintiff, E. Ward, and the other inhabitants of the street, some of whom are tenants of houses therein, in which the plaintiff, E. Ward, has a beneficial interest; and the value of the messuage, or coach-house, stable, and premises, and other houses and messuages in Granby Street, is very much increased by the direct communication through that street to the Hampstead Road; and, in particular, the carriages and horses belonging to the plaintiff, J. Spencer, have frequent occasion to pass through Granby Street, to and from the Hampstead Road.

That, by an act made and passed in the 3rd year of the reign of William the Fourth, intituled, "An Act for making a Railway from London to Birmingham," it was, among other things, enacted, that, in all cases wherein, in the exercise of any of the powers by the act granted, any part of any carriage or horse-road, railway, or tram-road, either public or private, should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or the persons entitled to the use thereof, the said Company should, at their own expense, before any road should be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road (as the case may require) to be set out and made instead thereof, as convenient for passengers and carriages as the road so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as might be.

That, by another act of Parliament, made and passed in the 4th and 5th years of the reign of William the Fourth, intituled, "An Act to enable the London and Birmingham Railway Company to extend and alter the Line of such Railway, and for other purposes relating thereto," it was amongst other things enacted, that the Company should, at their own costs and charges, within two years from the passing of the last-mentioned act, make, and for

ever thereafter keep in repair a good substantial brick bridge over the railway authorized to be made in Granby Street, so as to leave such street of its present width, and uninterrupted, and each side of such bridge to be defended with a brick wall, coped with stone, of the height of six feet.

That, about April, 1836, the Company began to construct their railway under Granby Street, and about the 1st of June, 1836, they completely cut through and across the whole of the street, and entirely stopped up the carriage and horse-road through it, and thereby all access through Granby Street to the Hampstead Road for horses and carriages was and is wholly obstructed; and the said street, and the horse and carriage-road through the same are so much injured as to be wholly impassable for horses or carriages, and impassable or inconvenient for foot-passengers: that the Company, their servants or agents, might have constructed the bridge so as to carry the railway under Granby Street, without stopping the horse and carriage-way through that street, and that, before cutting through or stopping up the said road, they ought to have set out and made instead thereof, another good and sufficient road, with a direct access for horses and carriages from Granby Street into the Hampstead Road, as convenient for passengers and carriages as the road through the said street so obstructed; and that by only cutting across one-half, or some other proportion of the breadth of the street at one time, they might have preserved on the other half, or other proportion of the breadth of the street, a road or passage along the same for horses and carriages, which, although not so convenient as the whole breadth thereof, would yet have been passable, and have preserved the communication aforesaid. That the Company, before cutting through the street, have not caused any other good and sufficient road, or any road, passage, or means of communication whatever, for horses and carriages, or convenience for pas-

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sengers to be set out or made instead thereof, so as to preserve the said communication.

That the Company threaten and intend to proceed to extend the cutting across Granby Street, so as to make such cutting double the width which the same now is, and to cut across the whole of the street to the depth of fifteen feet or thereabouts, and to a breadth of forty feet at least; that, in consequence of Granby Street being so stopped up and cut through, the plaintiff, J. Spencer, has lost the direct communication for his carriages and horses with the Hampstead road, and the only means of communication or access now left for carriages and horses from Granby Street to the Hampstead Road, is by means of a very circuitous and dangerous unpaved road called Harrington Street: and in consequence of the direct communication between the Hampstead Road and Granby Mews being stopped up, J. Spencer has lost nearly the whole of his business.

That, at or about the time when the Company began to cut through Granby Street, one of the surveyors or engineers of the Company informed the plaintiffs or gave them to understand that the Company were empowered by virtue of the said acts of Parliament to stop up the said street, and owing to such representations the plaintiffs were deterred from taking any proceedings to prevent the Company cutting through the street, or to compel them to set out another road, according to the provisions of the said act. The bill charged that the Company began to cut through the street without any previous notice of their intention so to do, and in evidence thereof, that a coach and horses returning at night in the care of a servant of the plaintiff, J. Spencer, unaware of the cutting, was overturned in such cutting, and very considerably injured, so that J. Spencer has been obliged to expend considerable sums of money in repairing the damage thereby occasioned.

The bill prayed that it may be declared that the Company

were bound, pursuant to the provisions of the act, before the horse and carriage road through Granby Street was cut through, stopped up, and injured, as aforesaid, to have caused another good and sufficient road to be set out and made instead thereof, as convenient for passengers and carriages as the road so cut through and stopped up, or as near thereto as may be, or were bound to have left one half or other sufficient proportion of the road through Granby Street not cut through, so that the whole of the horse and carriage road should not be stopped up at the same time, and that they are bound to make good the loss sustained by the plaintiffs, and especially by the plaintiff, J. Spencer, from their neglecting so to do; and that the Company may be decreed to make and set out or cause to be made and set out a proper road or communication for horses, and carriages, and passengers, along Granby Street, so as that convenient access through the same, for horses, carriages, and passengers, into the Hampstead Road may be made or left; and that an account may be taken of all sums of money which the plaintiff, J. Spencer, has been obliged to lay out and expend by reason of the street having been cut through as aforesaid, and of all loss and damage sustained by the plaintiffs or either of them, by reason of the cutting through and stopping up of the horse and carriage road as aforesaid: and that the Company may be decreed to pay to the plaintiffs the amount which shall be found due to them respectively on taking the said account, and also the costs of this suit, and that in the meantime the Company, their servants and agents, may be restrained from cutting through or injuring, and from continuing to cut through, stop up, and injure the said horse and carriage road leading through Granby Street to the Hampstead Road. And for further relief.

The defendants put in a general demurrer to the bill.

Mr. *Wigram* and Mr. *Booth* in support of the demurrer.

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—The Attorney-General ought to have been a party to this suit, either by instituting it in the shape of an information by him, or by making him a party defendant. There has been no infringement of a private right, but (if any) a public injury, which can only be the subject of an indictment at law or in this court, or of an information by the Attorney-General. The distinction is laid down in *Baines v. Baker* (a), by Lord *Hardwicke*, who held, that a nuisance, similar to that of which this bill complains, is a nuisance *ad vicinetum*, or a public nuisance. In Lord *Redesdale's* Treatise on Pleading (b), it is laid down, that in cases of public nuisance, courts of equity interfere at the suit of the Attorney-General, and, if such were not the rule, every individual in the kingdom might file a separate bill for the same object, where a public injury has been committed.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stuart*, contra.
 —The plaintiffs are clearly entitled to some part of the relief prayed, and the demurrer to the whole bill cannot, therefore, be sustained. By the act of Parliament, a contract was created between the public and the Company, and the latter are bound strictly to perform the terms of that contract; *Blakemore v. Glamorganshire Canal Company* (c). The Company were bound not to commence cutting through this road, until they should have made, instead thereof, another road, as convenient as the present road, or as near thereto as may be, and the plaintiffs are certainly entitled to compel the compliance with the act of Parliament, and to obtain individual relief to this extent. Supposing this to be a public nuisance, and that the Attorney-General is entitled to file an information, that is no restriction of the rights of individuals specially injured; for otherwise, if the Attorney-General were to refuse to file an information, a party injured would be without re-

(a) *Ambl.* 158; 3 *Atk.* 750. (b) *P.* 144. (c) 1 *Myl. & Kee.* 154.

medy. In the case of *The City of London v. Bolt* (a), an injunction was granted to restrain a public nuisance, at the suit of the Corporation of London, and no objection was made that the Attorney-General was not a party. *Grafton v. Hilliard* (b).

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Mr. *Wigram* in reply.

The VICE-CHANCELLOR.—The question is, whether the bill does not state a case upon which, if true, some relief must be granted. With respect to the nature of the nuisance, it appears to me, that the inhabitants of Granby Mews suffer a peculiar species of injury, distinct from that which may be experienced by his Majesty's subjects in general. If the excavation be widened, and the entrance narrowed, it will prevent all egress and ingress from and to Granby Mews, and the carriages and horses of the inhabitants of the Mews will be blocked up. In this respect, the injury to them from these works differs from that which is experienced by individuals in general. The question then is, whether some species of mischief is not done, or about to be done, in respect of which the plaintiffs have a right to apply to this court. It is clear that Spencer might have recovered damages at law, if he had brought his action; though it does not, therefore, follow, that he is entitled to relief in equity. But, both with regard to what has been done, and to what may yet be done, it appears to me, the plaintiffs have a special right, quite distinct from the right of the public at large. I think, therefore, that some relief ought to be granted, and it follows that the demurrer must be overruled.

August 3rd.

The plaintiffs moved for an injunction in the terms of the prayer of the bill.

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Affidavits were made by the plaintiffs, and other persons,

(a) 5 Ves. 129.

(b) Ambl. 159 n.

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verifying the statements of the bill. Counter-affidavits were made, on the part of the Company, by which R. Stephenson, the principal engineer, and the other engineers of the Company, deposed, that, if the works were allowed to continue without interruption, that part of the tunnel which was under Granby Street might be compleated so as to have the road made good over the same in a month from that time. That a temporary bridge for horses and carriages could not be erected in a much shorter period, during the whole time of the making of which the works of the railway in that place would be stopped, and their final completion much retarded.

Two letters, written by the solicitor of the plaintiff to the solicitor of the Company, were produced in evidence. One of such letters, dated the 21st of June, 1836, was as follows:—"I am directed by the landlord and different tenants in Granby Street, Hampstead Road, to apply to you to cause a temporary communication for foot passengers to be made from that street to the Hampstead Road: these tenants are solely dependant on their customers in Mornington Crescent and Place; and, for want of a passage, it has been a very serious loss to them. Mr. Spencer, of Granby Street, has also a claim against your Company for negligence, by reason of your having broken up the road, and not having placed any lights or posts to prevent carriages passing, by which means one of his coaches has been damaged, and one of his horses so injured as to be still unable to work." The other of such letters, dated the 24th of June, was as follows:—"My clients requested me to make an application to you, which I did, without threatening proceedings, but only wishing for a temporary communication for foot passengers, and some reparation to Mr. Spencer for the damage to his coach and one of his horses, occasioned by your servants not placing any lights or guard against the road you had broken up. I think I could have prevailed on my clients, in the first instance, to have been

content with a bridge for foot passengers, and not have enforced a carriage-way to be made until the other was completed. They now consider themselves unfairly treated; and it will be for you to get them to waive their right to a carriage-road."

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Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stuart*, in support of the motion.

Mr. *Wigram* and Mr. *Booth*, contra.

THE VICE-CHANCELLOR.—There are two points to be considered in dealing with the present motion. First, whether, upon the true construction of the 67th section of their act, the Company can be permitted to say they are unable either to make a temporary road on the line of Granby Street, or to make such a proper substitute for that road, as would be either equally convenient, or as near thereto as may be. The line marked with yellow on the map, appears to me a convenient substitute for the road which is stopped up; but I am told the Company are precluded by the act from taking land in that line, under the clauses which restrict their powers with respect to lands belonging to the Duke of Bedford and Lord Southampton, and lands appropriated as gardens, yards, and such appendages to houses. I will assume, therefore, that the yellow road cannot be taken. But there is no evidence, nor has any thing been said in argument, which shews that the circuitous road, by turning up Granby Street, and then down Harrington Street, and Rutland Street, to the Hampstead Road, can possibly be said to be as nearly convenient as may be. Then it comes to this:—if the act is so constructed that there can be no substitution for Granby Street in its original state, except by making a temporary bridge over the line of the tunnel in that direction, such a bridge must be made. The Company can never be allowed

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to say, that they are physically unable to do that which is contemplated by the act which they have obtained. The act of Parliament is the bargain between the Railway Company and the public; by obtaining it the Company admit the physical possibility of carrying its provisions into effect; and the terms of the act make it incumbent upon the Company, if they make the tunnel through Granby Street, to make, in the first instance, a temporary road in the line of Granby Street. This I must consider the Company were bound to do; but instead of so doing, they have, by their own voluntary act, without attempting to make a temporary road, thought proper to make the excavation in the line of Granby Street.

The second question is, whether, as the Company insist, there has been such an acquiescence on the part of the plaintiff, Spencer, as to prevent him having any relief. I do not think that Spencer was at all apprised of his rights. The letter of the 21st of June, relied on as shewing acquiescence, is a letter which represents generally, that Mr. Fisher was directed to apply to the solicitor of the Company on the subject: [His Honor read the letter.] It does not appear to me, that any representation had ever been made to Mr. Spencer about what his rights were, but from Ward's affidavit it appears, that a representation was made by Fox, the Surveyor of the Company, to Ward, that the Company were authorized to stop up Granby Street, by virtue of their act of Parliament. In one sense that is true, but it is not altogether so. The Company would be authorized to stop up Granby Street by virtue of their act, provided there could have been a substituted direction as nearly convenient as might be. So that it was not strictly true that they were at liberty to stop up Granby Street: [His Honor read the letters of the 21st and 24th of June.] I think the true construction of these two letters is, that Mr. Spencer would have been content to have made no further objection, provided the Company had

thought proper to accede to the request made in the letter of the 21st; and it is extremely probable, that if the Company had said that they would satisfy the claim to compensation made on behalf of Mr. Spencer, he would have received it, and been satisfied; but it is clear from the letter of the 24th of June, that he did not acquiesce. After taking some time to consider their legal remedies, the plaintiffs file their bill on the 25th of July. By the letter of the 24th of June, notice was given to the Company, that Spencer would not waive his right to the carriage-road; still the Company went on, and made an excavation entirely across Granby Street, and now say that it is extremely difficult to make a temporary road, having regard to the fact, that they have already made part of the tunnel. The answer to that is, if, according to their act, no substituted road could have been originally made in the direction of Granby Street, the Company have been the voluntary authors of the difficulty which has been created. The only difficulty, after all, is on the question of expense, and for such a reason, an opulent Company like the present, cannot be allowed thus to completely block up a passage, such as existed in Granby Street. The matter may be one of slight importance, but it is of great importance that matters of this kind should be treated by courts of justice according to the rule of right between the parties; for although this may be insignificant, yet, if it be passed over, the Company will have only to do with the greatest possible activity that which will produce irreparable mischief to other parties, and then say that their works ought not to be interfered with. Such a rule would, in effect, be to close the courts of justice to complaints made against a Company, which may in a very few hours do that mischief which, when done, they may say has been so done as to prevent their giving that measure of justice to which the parties injured are entitled.

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The power of the Court to grant that species of injunc-

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tion which Lord Eldon granted in one case (a), namely, restraining a party from allowing a thing to continue, which has the effect of making him take some active measures, has been since recognised and acted on; I do not see why, if that species of negative injunction has been adopted, it should not be adopted in this case, so as to prevent the parties from continuing the excavation in its present state, and also from enlarging it. Notwithstanding what Lord Brougham has said in *Blakemore v. The Glamorganshire Canal Company* (b), I think it is competent for this Court, by wording an injunction in a negative form, to compel persons who have begun to take away the rights of others, in some measure to restore them. The injunction asked for, as far as it restrains the defendants from widening the excavation, is quite of the common nature; but so far as it seeks to prevent the continuance, it is of a negative kind. The effect of it will be, that the Company will be put to more expense than they otherwise would be; but that is occasioned by their own voluntary act. The plaintiffs are at liberty to take an injunction in such form as will restrain the Company from using the tunnel in its present state, until they have made that temporary road which, by the act of Parliament, they are bound to make.

The defendants moved, before the Lord Chancellor, to discharge the order of the Vice-Chancellor.

Mr. *Wigram* and Mr. *Booth*, in support of the motion, submitted, that the acquiescence of the plaintiffs in the works complained of disqualified them from now complaining. All the damage that could possibly be caused to the plaintiffs had been done before the bill was filed. That the effect of the injunction, as worded by the Vice-Chancellor, was to bring the works of the Company to a stand;

(a) See *Lane v. Newdigate*, 10 Ves. 192.

(b) 1 Myl. & Keen, 184.

and, in reality, to continue the nuisance, by preventing the defendants completing the works and bridge.

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Mr. *Jacob* and Mr. *Stuart*, for the plaintiffs.

LORD CHANCELLOR.—As I understand the case, the injunction restrains the Company from cutting through or stopping up a carriage-road which has ceased to exist, and had, in fact, ceased before the injunction issued. The injunction restrains the Company from continuing their work. It is stated to me, that the road can be restored as speedily by making the bridge which was intended to be made as by filling up the cutting. The Company are ordered to restore what they have done, and that, probably, will take more time than would be occupied in completing what they have begun. If a temporary bridge were erected, I am told that it must be taken away before the permanent bridge could be made, so that there must be an interval. The circumstance that there was no existing road at the time the injunction was granted, certainly does not affect the question. The act of Parliament provides, that certain things should be done, and the Company must be bound by the act. The substituted road must be made as convenient as may be; and, unless the Company can make out that going by Harrington Street is so, they cannot bring themselves within the terms of the clause. The plaintiffs are (subject to the question of acquiescence, and supposing that there has been no acquiescence), entitled to every security which, under the circumstances, they can have. The sole object of the plaintiffs must be, to remove this grievance as soon as possible. The Company have done an act that they were not authorized to do, and the plaintiffs, no doubt, are very much injured by it: but, under the existing state of things, it seems to me, that the best thing for the plaintiffs and all parties would be, that the work should be completed. It is said, on the part of the Company, that

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they can complete the work in three weeks. Will it not be better that I should suspend the injunction for three weeks, without proceeding to adjudicate on the rights of the parties; the Company undertaking, in that time, to restore the carriage road? It is important to the Company that they should settle this matter; because, in disposing of the injunction, I should not dispose of the question between the parties: for, if they proceed at law, the Company may be liable. I think, also, it would be right that the Company should lend themselves to making some compensation to the plaintiff.

The effect of this injunction may be, to compel the Company to do that which the plaintiffs do not wish them to do. The object of this court is, as far as possible, to do the best it can for the protection of existing rights; and it appears to me, that if I suspend the injunction in the manner I have said, that will give to the plaintiffs all they can get in the present state of things. As the injunction now stands, I cannot see how the Company are to act. They are prohibited from proceeding with the work, and are without the power of stopping it up, although it may be exceedingly dangerous. If the plaintiffs consent, I will order the injunction to be suspended, upon the understanding, that it is to be dealt with again in three weeks, if the Company do not, within that time, do what is required.

[The counsel for the Company having offered to refer the question of compensation and costs to some gentleman of the bar, the proposal was acceded to by the counsel for the plaintiffs].

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*June 22nd,
25th; July
12th, 16th,
20th; Novem-
ber 5th.*

BETWEEN RICHARD EDWARDS, THOMAS CASE,
BARTHOLOMEW BRETHERTON, JOHN CLARE
and Others, on behalf of themselves, and
all other persons interested under or in
the tolls authorized to be levied by virtue
of a certain Act of Parliament, made and
passed in the Second year of the reign of
King William the Fourth, intituled "An
Act for more effectually repairing, amend-
ing, and improving the Roads from Liver-
pool to Prescot, Ashton, and Warrington,
in the County Palatine of Lancaster," - Plaintiffs.

and

THE GRAND JUNCTION RAILWAY COM-
PANY, - - - - - Defendants.

THE bill stated that, by an act of Parliament [being the act above mentioned] it was amongst other things enacted, that all his Majesty's Justices of the peace acting for the county Palatine of Lancaster, together with the plaintiffs and other persons therein named, being duly qualified to act as trustees of turnpike roads in England, should be, and they were thereby appointed trustees for carrying the said act into execution, and that it should be lawful for the trustees at any of their general meetings, to be holden as therein mentioned to elect any number of persons, not ex-

The Directors of a Company for the incorporation of which a bill was pending in Parliament, had projected a Railway to cross a certain turnpike road. The trustees of the road had taken measures for opposing the bill, unless certain clauses restricting,

with regard to such road, the general powers proposed to be granted in the bill were introduced therein. The Company, by their agent or manager, entered into an agreement with the Trustees, to the effect that, instead of such clauses being inserted in the Act, the substance of them should be embodied in an agreement between the Company and the Trustees. One of the terms of such agreement was, that the Trustees should not oppose the bill, and they accordingly made no opposition to it. The Act passed, without the restrictive clauses originally contemplated by the Trustees:—*Held*, by the Vice-Chancellor, and by the Lord Chancellor, affirming his Honor's decision, that the incorporated Company, could not, as against the Trustees, exercise a power conferred by the Act, in violation of the terms of the agreement.

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ceeding three, to be trustees with them; and powers were given to the trustees to make, repair, and improve the roads, and demand and take the tolls thereof. That the business of the turnpike trust is managed and conducted by means of monthly meetings of the trustees, and by committees appointed by the trustees at such meetings, and that W. Rowson is the clerk and solicitor of the trustees. That the line of road under the management of the trustees is thirty-two miles in length, and comprises the turnpike road between the towns of Liverpool and Warrington, in the county of Lancaster, which is the direct road from Liverpool to Birmingham and London, and also from Liverpool to Manchester, and is passed and repassed, during the night as well as the day, by carriages and carts of every description, and in great numbers.

That in the year 1832, J. Moss, R. Gladstone, C. Lawrence, and other persons afterwards incorporated, proposed and agreed to apply for an act of Parliament, to establish a company to be called "The Grand Junction Railway Company," for the purpose of making a railway communication between the towns of Liverpool, and Manchester and Birmingham, and they adopted the usual means for forwarding the undertaking, and appointed J. Moss, and C. Lawrence, two of the directors of the undertaking and intended company; and they also appointed Messrs. Clay and Swift to act as their solicitors.

That a monthly meeting of the trustees of the turnpike roads was held on the 15th January, 1833, when Mr. Swift attended on behalf of the subscribers to the undertaking, and applied to the trustees for their consent to the proposed line of railway being carried under the turnpike road, at a place called Bank Quay, near to the town of Warrington, and it was ordered that the application should be taken into consideration at the next monthly meeting. That on the 19th of February, 1833, the application was taken into consideration, and an order or resolution

was passed by the trustees then present, which was as follows :—

“ This meeting having duly considered the application made at the last meeting by Mr. Swift, on behalf of the Grand Junction Railway Company, It is ordered, that R. Edwards, T. Case, B. Bretherton and J. Clare, Esquires, be appointed a committee to negotiate with the directors of the Railway Company, as to the mode and terms of carrying the proposed railway under the turnpike road, and other questions connected with the trust in reference thereto, with full power to conclude such an arrangement with the directors, as may by them be deemed most beneficial to the interests of the trust.”

That, W. Rowson on the 20th of February, 1833, addressed a letter to Messrs. Clay and Swift, and annexed thereto, a copy of such order or resolution, and intimated a desire to hear from them, as to an appointment for the meeting of the committee of trustees and the directors acting on behalf of the subscribers to the undertaking; but no answer to such letter was received.

That on the 19th of March, 1833, another monthly meeting of the trustees was held, when another order or resolution was made and passed by the trustees then present, which was as follows :—

“ The committee appointed at the last meeting to negotiate with the directors of the Grand Junction Railway Company, having reported that no meeting had taken place, It is ordered, that such committee be requested to endeavour to effect a negotiation with the directors, as well with reference to the proposed railway crossing the turnpike road at Bank Hall, as also with reference to a pecuniary compensation, for the injury the turnpike roads will sustain by such railway in the diminution of the tolls, and the prejudice consequently done to the creditors of the trust. That such committee be empowered generally, to adopt such measures, either by opposing the bill, for the railway

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in Parliament, or otherwise to effect the object above referred to, as to them may seem expedient should their negotiation terminate unsatisfactorily."

That, shortly after the last mentioned meeting, a negotiation upon the subject of the application of Mr. Swift, and with a view to an amicable adjustment of the question which had arisen between the parties, was carried on between T. Case and J. Moss, who was authorized to act therein, on behalf of the subscribers to the undertaking, but such negotiation having proved unsuccessful, and being likely to terminate, W. Rowson was instructed by the trustees immediately to adopt measures for making a vigorous opposition to the passing of the bill. That the bill having then already passed through the House of Commons, two petitions to the House of Lords against the bill were prepared and signed by such of the trustees of the turnpike roads and the bond holders and creditors of the trust as were then in the neighbourhood, or whose signature could be conveniently procured, and various clauses were also drawn which the trustees were desirous of having introduced, and proposed should be inserted in the bill; and on the 17th of April, 1833, W. Rowson, in company with the plaintiff, S. Taylor, who had been the chairman at the last meeting of the trustees, waited upon the Earl of Derby, then Lord Stanley, (one of the trustees of the roads), for the purpose of acquainting him with the circumstances and merits of the case, and of soliciting him to present the petitions and support the prayers thereof by his vote and influence.

That the Earl of Derby suggested the propriety of W. Rowson ascertaining from T. Case, whether he had come to any understanding or agreement on the subject with J. Moss, which he considered binding or obligatory upon the trustees; and W. Rowson thereupon waited upon T. Case, who desired him to attend a meeting on the following day at Liverpool, between T. Case and J. Moss.

That such meeting took place on the 18th of April, 1833, between T. Case and W. Rowson, on behalf of the trustees, and J. Moss, C. Lawrence, and Mr. Clay, on behalf of the subscribers to the undertaking, when a draft containing the clauses which were proposed to be inserted in the bill was produced and considered, and several alterations were suggested and made therein by W. Rowson as well as by Mr. Clay; and such clauses when altered were adopted and agreed to by all parties present, and the draft thereof as ultimately adopted and settled was as follows:—

“ And whereas the said railway will cross the turnpike road between Liverpool and Warrington, at or near to a certain place called Bank Quay, in the township of Warrington, in the parish of Warrington, in the county palatine of Lancaster; Be it therefore enacted, that in case the said railway shall be made under or across the said road under the authority of this act, the same shall not be carried over the said turnpike road on the level, but shall be carried under the said turnpike road, and the company of proprietors hereby incorporated shall at their own expense erect and build a good firm and substantial bridge of brick, stone, or iron, over the said railway where the same shall cross the said turnpike road, with proper approaches thereto, upon which bridge the said turnpike road shall be made of good and sufficient materials, and executed in a good and workmanlike manner, at the expense of the said company, and to the satisfaction of the surveyor for the time being of the trustees of the said turnpike road, and the battlements of the said bridge shall not be less than four feet in height, and shall be closed and continued for not less than thirty yards on each side from the summit of such bridge, and the ascent of the road over such bridge, and the approaches thereto, shall not in any case be more than one foot in thirty feet; and the said road so to be made by the company as aforesaid, shall be formed of such width as to leave a clear and open space between the fences of such

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road equal to the width of the present road there : And be it further enacted, that the said company shall, at all times for ever after the said bridge shall have been erected under the authority of this act, keep the same and any future bridge to be erected in lieu thereof, and which shall be of the like dimensions, capacity, and materials, as are hereinbefore mentioned, in good, perfect, and complete repair, except only so far as regards the roadway over such bridge, which is [save as hereinafter mentioned] to be repaired by the trustees of the said road ; and the said Company shall and will at all times hereafter well and sufficiently repair and make good all damage and injury which may arise, or be occasioned to the said roadway over the said bridge, for or by reason of any repairs or alteration of, in, or to the said bridge by the said company and in case of any want of repair to the said bridge, or the roadway over the same, in the event last aforesaid ; and notice being given by the trustees of the said turnpike road, or their clerk or treasurer, or any other person, authorized by the said trustees to the said company of proprietors hereby incorporated, or to their clerk or treasurer for the time being, of any want of repairs to the said bridge, or to any bridge to be erected in lieu thereof, under the authority of this act, or the roadway over the same in the event aforesaid, if the said Company of Proprietors hereby incorporated shall not for the space of one calendar month after service of such notice commence such repairs and proceed therein with all reasonable expedition until the same shall be completed, the said trustees may, in case they shall see fit from time to time, repair or rebuild the said bridge and repair the roadway over the same, in the event aforesaid as the case may require, and as the said trustees shall think necessary ; and all the expenses thereof shall, upon demand, be repaid by the Company of Proprietors hereby incorporated to the said trustees or their treasurer for the time being.”—[The clause then provided

in default of payment for the recovery of such expenses in manner therein mentioned.]

That at the last mentioned meeting, J. Moss suggested, that as the bill was then in the House of Lords, it would save time, trouble, and expense to the Company, if the insertion of the aforesaid clauses were dispensed with by the trustees of the roads, and an undertaking given that an agreement should be executed to the same effect; and the plaintiff, T. Case, upon the faith and understanding that the trustees should be in the same situation as if the clauses had been actually inserted in the proposed act or bill, agreed to such suggestion, and thereupon J. Moss signed a memorandum at the foot of the draft as follows:—

“ I, the undersigned, J. Moss, undertake to execute an agreement to the effect of these clauses, so soon as the same is prepared, and to get the same confirmed under the seal of the Company intended to be incorporated so soon as circumstances will permit. This agreement being made on the express understanding that there shall not be any opposition to the bill now in parliament, either by the trustees of the road from Liverpool to Warrington, or the mortgagees of the tolls of the roads; and this agreement is to be void on my delivering to the road trustees, or their clerk, the engagement of the intended Company to the same effect.” And a memorandum was subjoined, signed by the plaintiff, T. Case, as follows:—“ I recommend the trustees to confirm the above agreement.”

That such arrangement, made by the plaintiff, T. Case, was immediately communicated to the plaintiffs, R. Edwards, B. Bretherton, and J. Clare, when there was some difference of opinion on the subject; but it was arranged that a meeting of the committee and of the plaintiff, S. Taylor, who had been such chairman as aforesaid, should be held in Liverpool, on the 20th of April, for the purpose of taking it into consideration, and a letter was at the same time

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addressed and sent by W. Rowson to Messrs. Clay and Swift, as follows:—

“ I very much regret that I am not yet enabled to say whether or not the trustees of the roads will accede to the terms offered yesterday, there being a difference in opinion on the subject, the committee have however agreed to meet at Mr. Case’s office in Liverpool, to-morrow, at one o’clock, and as soon as I know their determination, I will apprise you of it.”

That a meeting took place at Liverpool, on the 20th of April, 1833, between the plaintiffs, T. Case, J. Clare, and S. Taylor, with the privity of the plaintiffs, R. Edwards, and B. Bretherton, who were unable to attend the meeting, but assented to the arrangement, when it was unanimously agreed, that the arrangement made by T. Case, should be confirmed, and W. Rowson thereupon immediately informed Mr. Clay, that the committee had confirmed the arrangement, and he at the same time left with him for perusal and approbation the draft of a deed of covenant, founded upon the clauses which had been adopted and settled, and which draft W. Rowson had prepared on the preceding day, in order that no time might be lost in case the committee should confirm the arrangement.

That W. Rowson, also, on the 20th of April, 1833, addressed and sent a letter to the Earl of Derby, as follows:—

“ I have the honor to inform your Lordship, that such an arrangement has this day been made between the trustees of the roads and Mr. Moss, on behalf of the directors of the Grand Junction Railway Company, as will render it unnecessary to present the petitions which Mr. Taylor and myself named to your Lordship on Wednesday last.”

That, thereupon all idea of opposing the further progress of the bill, and of attempting to get the clauses which had been prepared inserted therein, was abandoned, and the petitions were not presented.

That, on the 23rd or 24th of April, 1833, the draft was returned to W. Rowson by Mr. Clay, with certain marginal observations and alterations therein, in red ink, and it was accompanied by a letter from Mr. Clay to W. Rowson as follows:—

“ Mr. Moss had left Liverpool for London before I could see him, upon your draft contract; however, I forwarded a draft copy to Mr. Swift in London, with the alterations in red ink similar to those which I have made in your draft, returned herewith, and which I submit are proper and necessary, in conformity with the arrangement. As to the height of the fence walls, we think six feet unreasonable, and do not imagine, that either Mr. Patten or Mr. Moss will consent to it. We also think the width of the bridge unreasonable, and that it ought to be modified and expressed in terms; as soon as we receive Mr. Moss's reply, or the engrossment executed by him, I will communicate with you.”

That the marginal observations of Messrs. Clay and Swift, referred to provisions requiring the bridge to be built to the satisfaction of the surveyor of the trustees, and the roadway to be of its present width, and which it was observed were unreasonable; and also, to a clause rendering J. Moss, as well as the intended Company, liable for repairs and alterations of the bridge, and injury to the roadway, in consequence thereof, and opposite to which, were written the words “certainly not,” and the part objected to was struck out, but the other alterations were of a formal nature.

That no reply from J. Moss was received by W. Rowson, and no further communication upon the subject was made to him or the plaintiffs, by Messrs. Clay and Swift, or J. Moss; but all opposition to the further progress of the bill having been withdrawn on the faith of the arrangements, the bill on the 6th May, 1833, received the royal assent, and became an act of Parliament.

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That such act is intituled "An Act for making a railway from the Warrington and Newton railway, at Warrington, in the county of Lancaster, to Birmingham, in the county of Warwick, to be called the Grand Junction Railway;" and J. Moss, R. Gladstone, C. Lawrence, and other persons therein named, and all other persons and bodies politic and corporate, who had subscribed, or should thereafter subscribe, towards the undertaking, and their several and respective successors, executors, administrators and assigns, were thereby incorporated by the name and style of "The Grand Junction Railway Company," by which name they were enabled to sue and be sued; and they were authorized to make the railway, and the affairs of the Company were to be managed by directors; and it was thereby amongst other things enacted "That when any bridge should be erected for carrying any public road over the railway, the road over such bridge should be formed, and should, at all times, be continued of such width as to leave a clear and open space between the fences of such road, of not less than fifteen feet, and the ascent of every such bridge, for the purpose of such public road, should not be more than one foot in thirteen feet, and a good and sufficient fence should be made on each side of every such bridge, which fence should not be less than four feet above the surface of such bridge."

That some time after the act had been passed, an intention was entertained of adopting another line of road, whereby the crossing of the road at Bank Quay would have become unnecessary, and measures were taken for carrying such intention into effect, and some communications on the subject passed between W. Rowson and Messrs. Clay and Swift; but such intention was subsequently abandoned, and the old line of the proposed railway was ultimately adopted, although no communication was made to the plaintiffs, by or on behalf of the Railway Company, respecting the railway crossing the road at the Bank Quay

until the month of March, 1836, when one of the surveyors of the roads addressed a letter to W. Rowson, which was as follows:—

“ I understood that by the agreement entered into between the trustees of the Liverpool and Warrington road and the Grand Junction Railway Company, it was stipulated that, whenever the turnpike road might be carried over the railway, the original width of the road was to be preserved, both on the bridge and the approaches to it. If I am correct in this supposition, I must beg to call your attention to the bridge which is at present in course of erection at Bank Quay. If it is the intention of the Company to carry the turnpike road over the railway by means of that bridge, the width of the road at the place is fifty feet, while the proposed width of the bridge and approaches, as shewn by the wing-walls, already erected, does not exceed thirty feet.”

That such letter contained a correct representation of the proceedings of the Railway Company, and immediately on its receipt, W. Rowson addressed a letter to Messrs. Clay and Swift, and a correspondence ensued between them and W. Rowson; and also between J. Moss, who is, and always has been, one of the directors of the Company, and the plaintiff S. Taylor relative thereto, and to the agreement: but such correspondence terminated on the 20th day of April last, and the Company now refuse to perform or adhere to such agreement and arrangement.

The bill charged that, in the course of such last correspondence, the authority of J. Moss to make and conclude the agreement was not denied or disputed. That the agreement was confirmed by the committee of the trustees—that the intended opposition to the bill was withdrawn, and the petitions abandoned, on the faith of such agreement or arrangement, and that a deed for carrying the same into effect, was all that remained unsettled: and that the truth thereof is confirmed by an entry made

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in the day-book of W. Rowson, on the 20th of April, 1833, and which entry is as follows:—

“ Saturday, 20th April.

“ Journey to Liverpool with Mr. Taylor and Mr. Clare. Attending meeting at Mr. Case's office, when arrangement before made was confirmed. Attending Mr. Clay, in consequence, with draft agreement. Writing to Lord Stanley, and informing him of the arrangement made, and that in consequence, it would not be necessary to trouble his Lordship with petitions.”

That, when such difference first arose, the plaintiff, T. Case, did suppose and state, from an imperfect recollection of the subject, that the other members of the committee had not confirmed the agreement or arrangement made by him: that he has since examined the documents, and written memoranda which exist relative thereto, and is convinced that his first impression, as well as the statement made by him, were erroneous.

That Bank Quay is distant about a quarter of a mile from Warrington, and about a mile from the Sankey Navigation; and from its vicinity to those places, the passage or traffic on the road at Bank Quay, is very great, and in consequence thereof, the trustees of the road, some time since, incurred considerable expense in widening the road, at the very spot where the defendants are constructing the bridge and viaduct, and altering the road; and the effect of the projected alterations will be, to diminish and contract the width of the road there, to the extent, at least, of twenty feet upon the average, or from its present width of fifty feet to thirty feet, for a distance of nine hundred feet.

. That the defendants are proceeding with the alterations of the road, and intend to adhere to their plan of contracting the road, and much public inconvenience will arise, and much dissatisfaction has already been expressed, by the inhabitants of Warrington in consequence thereof

After a charge as to the due qualifications of the plain-

tiffs to institute the suit, and the impracticability of making parties the mortgagees of the tolls; and the usual charge as to papers—The bill prayed, that it may be declared, that the narrowing or contracting the width of the said road, at Bank Quay aforesaid, is a violation of the agreement or arrangement and undertaking, made and entered into as hereinbefore mentioned, and that any departure therefrom is a fraud upon the plaintiffs; and that it may be declared, that the said agreement bearing date the 18th day of April, 1833, is binding on the said defendants, and that they may be decreed specifically to perform the same, and to execute a proper deed conformably thereto, and to restore the said road to its former condition; and that the said defendants, their agents, servants, and workmen, may be restrained by the order and injunction of this Honorable Court from continuing and proceeding with their present works on the said road, at Bank Quay aforesaid, and from making or continuing any road at Bank Quay aforesaid, which shall not be of such width as to leave a clear and open space between the fences of such road, equal to the width of the road there, when the said act for incorporating the said Company passed: and from making any bridge, road, or viaduct, contrary to, or otherwise infringing or violating the said agreement of the 18th day of April, 1833, or the clauses therein referred to, and for further relief.

Notice of a motion for an injunction having been given, affidavits were filed by the plaintiffs, in support of, and by, the defendants, in opposition to such motion.

The plaintiff moved for an injunction, before his Honor the Vice-Chancellor.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Walker*, in support of the motion.

Mr. *Jacob* and Mr. *Sharpe*, contra.

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[The arguments of Counsel will be found on the appeal motion before the Lord Chancellor.]

VICE-CHANCELLOR.—The point in this case is certainly singular, because it tends to raise the general question; whether, when a person assuming to act as an authorized agent, allows the property of his employer so to be dealt with, that it becomes bound, and it afterwards turns out, that he was not an authorized agent—the employer is not to have the benefit of the contracts which that person has made? It struck me as a very strong circumstance in this case, that whether Mr. Taylor, Mr. Case, and Mr. Clare, either by themselves, or in conjunction with Mr. Rowson, were or not authorized finally to conclude the bargain with the directors of the railway; yet, in point of fact, in consequence of their proceedings, the trustees of the road were placed in a situation, from which they never could extricate themselves, inasmuch as the opposition was withdrawn. I believe that the soundest way of deciding such a question is, that where the consideration has actually been paid, even although there may not have been an authority to pay it, that it must be considered as enuring for the benefit of those parties from whom it substantially moved. It is clear to me, that whether Mr. Rowson did or did not exactly understand the degree of authority which he had, that he certainly acted as if his act alone were to be decisive upon the question; because, whether Mr. Edwards meant the opposition to be withdrawn or not, the letter to Lord Stanley had the effect of completely withdrawing it. It appears to me that it would be dangerous to say, even if the committee had not power to bind, that when one person acting as agent for the trustees did so act, as irrevocably to bind them, they should not have the benefit of that contract, especially when the other side have derived the benefit which they bargained for; namely, the withdrawal of the opposition.

The Railway Company have received all the benefit which they sought, and the utmost that can be said is, that the trustees of the road did not receive all the benefit which they desired, because Mr. Edwards wished to obtain more than in fact he was able to obtain. Still the opposition was withdrawn, and that was the thing that the Railway Company bargained for. I think that where parties are going before Parliament, for the purpose of being incorporated, a door would be open to great frauds, if bargains made by persons acting as their agents, when they are in a scattered and individual state, were not binding on the Company when incorporated. I think that there is nothing objectionable in point of law to such an agreement: if there were, it appears to me that, the opinion which first Sir *John Leach*, and afterwards Lord *Eldon* pronounced, in the case of the *Vauxhall Bridge Company v. Spencer* (a) is quite sufficient to furnish a rule for this case; and that the plaintiffs are entitled to an injunction.

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The defendants appealed from this decision.

Mr. *Jacob* and Mr. *Sharpe*, in support of the appeal motion, contended:—

That the agreement, as well as the draft deed, shewed, that the intention of Moss was to enter into a personal contract. That he never could mean to contract on behalf of a company not then in existence, and consequently incapable of ratifying any agreement. *Capes v. Hutton* (b) resembled this case. That a corporation can only be bound by an instrument to which the common seal shall have been affixed. *East London Waterworks Company v. Bailey* (c); *Dunston v. The Imperial Gas Light Company* (d). That the agreement was void on the grounds of public

(a) 2 Madd. 356; Jac. 64.

(b) 2 Russ. 357.

(c) 4 Bingh. 283; 5 Law, J. Rep. C. P. 175.

(d) 1 Law, J. (ns.) K. B. 49; 3 B. & Adol. 125.

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policy. *The Vauxhall Bridge Company v. Spencer*(a). That the case of *Dance v. Girdler*(b), shewed, that in the view of a court of law, a voluntary society, after a charter of incorporation, became a perfectly new body of persons in regard to contracts made with the society before incorporation. That the order of the Vice-Chancellor in effect introduced new clauses into an act of parliament. That not only would this Court, by continuing the injunction, sanction a fraud on the legislature, but also on the subscribers to the undertaking.

Mr. *Wigram* and Mr. *Walker*, in support of the injunction, contended;—

That Moss had power to bind, and had in effect completely bound, the company by the agreement in question. That the case of the *Vauxhall Bridge Company v. Spencer*(c), was an authority in favour of rather than against the legality of the transaction. That the interests of the public generally would be benefited rather than injured by the arrangement made by the trustees,

Mr. *Jacob* replied.

THE LORD CHANCELLOR.—The present state of these proceedings has the effect of placing these public works in a situation of very great embarrassment, because the injunction, as it stands, prohibits the Company from going on with the works, except under the terms of the alleged agreement. That agreement provides for the making of a bridge of the width of fifty feet, which is certainly an extraordinary bridge in point of dimensions. It does not seem to be contended, that it can be necessary for the benefit of the public that it should be of that width,—still the injunction prohibits the Company from going on with the works

(a) 2 Madd. 356 ; Jac. 64.

(b) 1 New Rep. 34.

(c) 2 Madd. 356 ; Jac. 64.

unless they comply with these terms, which, whether they are matter of contract or not, are terms in which the public are to some extent interested. On the other hand, if the injunction be dissolved, it will enable the Company to make a bridge fifteen feet wide,—a dimension as inconvenient in point of limit, as the other seems to be unnecessarily extensive. Fifteen feet width on a bridge at the approach to a great town is inconsistent with the interest and safety of the public. It is said, that the Company mean to make it thirty feet in width, but as the injunction stands, they cannot make it under fifty feet, and if the injunction be dissolved they may make it fifteen feet, a state of things very embarrassing to both parties, and which the public are much interested should not be prolonged. My reason for making this observation is, not that I mean at this moment to dispose of the case or give my judgment upon it:—for I think the interests of all parties may be answered if I at present abstain from so doing:—because, after all, it appears to me, that the subject in dispute, is of a very limited nature. The parties agree as to the elevation of the bridge the sole contest lies between a width of thirty feet and fifty feet. I certainly think that something between these two dimensions would be the best mode of providing for the interests of the contending parties; and although this bridge is in the neighbourhood of a great town, a breadth of forty feet would seem quite sufficient for public convenience. I think, therefore, that if these two bodies, both of them acting in a certain degree for the benefit of the public, (although the Company have to take care of the interests of those for whom they act,) would come to an arrangement with regard to the width of the bridge, they would best consult their own interest and that of the public; because whatever course I may adopt with respect to this injunction will leave one of the parties in a situation of great embarrassment; for it has occurred to me, that, whatever

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may be the merits of the question upon injunction, yet if the facts are as contended for by the trustees, an injunction is not the only remedy which they have. A very strong case upon such facts may be made for an application to the legislature, to contract and limit the powers which have been obtained under circumstances amounting to a sort of contract:—that might be the subject of another act of Parliament, for I cannot suppose, that, where by holding out promises, opposition has been kept off, and powers obtained under an act of Parliament, parties would be permitted by Parliament, if by this Court, to enforce powers thus obtained, without fulfilling such promises. I say nothing as to the merits of the case, or of my view of the rights of the parties; but, if the facts of the case are made out, probably the trustees of the road will find that they have the means of compelling the Company to comply with what they undertook to perform. I say nothing upon the evidence, except to draw the attention of counsel to the position in which the case stands before me; because, whatever the ultimate degree of merit may be, the question must be, how does it stand in point of proof. Supposing that the contract is not made out, or if made out, that it is not binding in point of law, the Railway Company may make a bridge as they please, provided it be not less than fifteen feet; and, supposing it turns out that the contract be established, it is obvious that it will be putting the Railway Company to great loss and considerable embarrassment. The question now before me, is not whether the contract is proved, but whether such a case has been made out, as makes it the duty of this Court to suspend all the proceedings until it has decided at the hearing of the cause what is the real contract between the parties.

This is a contract made with an agent, because, at that time there was no other person with whom the contract could be entered into; but then this question arises, whether, if a contract is made with the agent of persons

projecting an adventure of this kind, and then an act is obtained containing powers over the property of the individual, who, upon the faith of representations made to him, has abstained from opposing the bill, the Company exercising a power over that property by virtue of the act only, and which by law they could not otherwise exercise, even if the person by whose means they have procured these powers is not strictly speaking their agent, this Court has not jurisdiction to compel them to execute the terms upon which that individual has abstained from opposing their bill, and in that way assented to the power being vested in them? If the facts upon looking into the evidence are such as, according to my present impression, the circumstances now appear to be, I think I shall not have much difficulty in coming to a conclusion upon that question. It may however turn out, that the facts do not bear out that impression; and I only throw out these observations for the purpose of shewing the Railway Company the position in which they stand.

Having said so much, and it being obvious that, whatever course this Court may take if the cause goes to a hearing, if the proceedings of the Railway Company are to be restrained, it would be very disadvantageous to them; and on the other hand, if the injunction be dissolved, it would place the trustees in great difficulty, and be extremely injurious to those interested in the road;—it being also, I apprehend, admitted on the part of the trustees, that this bridge, without great detriment, may be less than fifty feet in width; and presuming that if the Railway Company were calmly and quietly to consider this question and the disadvantages that might occur to those whom they represent, they will enlarge it beyond thirty feet;—it being thus possible to secure the interests of both parties, I shall postpone the question of injunction, in order that communication may be made with the parties in the country, and I hope they will come to some arrangement

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making it unnecessary for me to give any opinion upon it.

[No arrangement having been come to, his Lordship was requested to pronounce his judgment on the question of injunction.]

November 5th.

LORD CHANCELLOR.—This is an application to dissolve an injunction granted by the Vice Chancellor, restraining the Grand Junction Railway Company from making a viaduct, to carry a road of which the plaintiffs are trustees over the Railway, of a less width than the other parts of the road. The width required by the Railway act, is fifteen feet and no more: the defendants propose to make it thirty feet; but the plaintiffs contend that the Railway Company are bound to make it fifty feet wide; and they support their case by saying, that whilst the Railway bill was before Parliament, the parties soliciting it agreed with the plaintiffs that this proposed bridge or viaduct, should be of the same width as the road, which is there fifty feet wide, and by so doing induced the trustees of the road to permit the bill to pass without opposition. I postponed my judgment to enable the parties to come to some arrangement, but that not having taken place, I am under the necessity of adversely disposing of this case.

It appears from the affidavits, that the plaintiffs Edwards, Case, Bretherton and Clare, were appointed a Committee of trustees, to negotiate and conclude an arrangement with the projectors of the Railway upon the subject of this road. Mr. Moss, and Mr. Lawrence, two of the directors of the Company, had the principal management of their affairs. Messrs. Clay and Swift were the solicitors of the directors, and Mr. Rowson, the solicitor of the plaintiffs.

On the 19th of March, 1833, the trustees instructed their committee to conclude if possible an arrangement, and if not, to take steps for opposing the bill in Parliament; and the affidavits state, “ that, there being no prospect of

an amicable arrangement, preparations were made for opposing the bill, and clauses were prepared, which the plaintiffs wished to have introduced into the bill, and a member of the House of Lords was applied to, to present a petition for that purpose." The affidavits then state, "that on the 18th of April, 1833, a meeting took place at Liverpool, between the plaintiff Mr. Case and Mr. Rowson, on behalf of the trustees for the road, and Messrs. Moss, Lawrence, and Clay, on behalf of the Railway Company, at which the clauses proposed to be inserted in the bill, on behalf of the trustees of the road, were discussed, altered, and finally settled, and contained a variety of provisions, and amongst others, 'that the bridge should be as wide as the road at that part,' which was fifty feet; that, thereupon Mr. Moss, on behalf of the Company, proposed, in order to save time and expense, that the object of the trustees should be secured by an agreement instead of by clauses in the bill, which being assented to on behalf of the trustees of the road, an agreement was signed which is in these words." [His Lordship then read the agreement of the 18th of April, 1833.]

Now there is no doubt or ambiguity upon this agreement,—it is a positive and distinct understanding,—not in the name of a non-existing corporation, (the bill being still before Parliament,) but on behalf of Moss, as manager for the projectors of the scheme, who were soliciting the act under which they were to be incorporated, and derive certain powers, to the purport, "that if the trustees of the road would permit the bill to pass in its then state without opposition, (that is without the insertion of clauses, which clauses had been agreed upon by the two parties,—the intended Railway Company and the trustees of the road,) that they should have the benefit of those clauses by way of agreement, under the security of the signature of Mr. Moss, acting for the projectors, undertaking for himself in the first instance to procure a contract by the corporation

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as soon as the corporation should be formed—the consideration being the abstaining from applying to Parliament, for the purpose of obtaining that protection which the trustees considered they had secured by means of this contract.” So far, that is the nature of the contract on behalf of the projectors of the Railway. On the other side, it appears that Mr. Case who attended on behalf of the trustees of the road, did not feel himself justified in binding them, or entering into any formal or distinct contract, and therefore the memorandum which he signs is in these words:—
“ I recommend the trustees to confirm the above agreement.”

The only material fact upon which the affidavits differ, is, as to whether the trustees of the road did or did not adopt the arrangement so entered into by Mr. Case. On their part the affidavits state, that there was a communication to the other members of the committee, Edwards, Clare, and Bretherton, and that some difference of opinion having arisen upon it, they agreed to meet at Liverpool on the 20th of April, for the purpose of taking the subject into consideration, notice of which was given on the 19th, by Mr. Rowson, to Messrs. Clay and Swift; that a meeting was accordingly held on the 20th, at which Messrs. Case and Clare attended, Edwards and Bretherton assenting to the arrangement, when it was determined to adopt the arrangement as originally agreed upon by Mr. Case on the 18th; and that on the same day Mr. Rowson informed Messrs. Clay and Swift of it, and sent to them a draft of the covenant to the effect of the clauses, whereupon the petitions of the trustees to Parliament were withdrawn; and that on the 23rd or 24th, Mr. Clay returned the draft with some suggestions and alterations. Now Mr. Clay (who does not appear to be the partner in the firm having the actual management of this business) could not when he made these alterations have known what had passed on the 18th, because the terms of the contract were then finally

settled, and were to be found in the proposed clauses: there was no difficulty therefore existing between the parties as to what was to be the arrangement; but the only question was, as to the form in which that arrangement was to be carried into effect. It is very important on another part of this case to observe the dates. On the 23rd and 24th, the draft is returned with some alterations, and an intimation that a copy of it had been sent to Mr. Swift and Mr. Moss, in London, and that Mr. Clay would inform Mr. Rowson as soon as he had heard from them.

The affidavit,—which is not contradicted,—then states, that no subsequent answer was sent; and the bill without the clauses received the Royal assent on the 6th of May.

Nothing further passed upon the subject until March, 1836, when, it appearing that the Railway Company were about to make a bridge only thirty feet wide, Mr. Rowson claimed the benefit of the contract for fifty feet, and then this contest began.

In answer to this statement, Mr. Moss (who is Chairman of the Railway Company) has made an affidavit, stating that on the 19th of April, Mr. Case informed him that the other trustees refused to concur in the arrangement, and that he (Mr. Moss) therefore considered it as at an end, and refused to look at the draft deed offered to him in London by Mr. Swift; and that in March, 1836, Mr. Case again stated that there was no agreement, and that Mr. Edward's letter to Mr. Rowson would shew that it was so. Upon this it may be observed, that this statement is totally inconsistent with the fact of the trustees having agreed to meet on the 20th, to consider whether they should adopt the agreement, and inconsistent with Mr. Rowson's letter, stating that a meeting on the 20th had been appointed for that purpose; but supposing this to have taken place, Mr. Moss and Mr. Swift, on the 22nd or 23rd of April, received in London from Mr. Clay the draft of the proposed covenant, with Mr. Clay's suggested alterations. By this they

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were at all events informed that the trustees did not consider the arrangement abandoned, but relied upon its being carried into effect, and upon the faith of the contract performed their duty, namely, abstained from any opposition to the bill. They not only knew that such was the impression of the trustees, but they also knew that their own agent, Mr. Clay, was acting upon the same impression, and yet they did not communicate to the trustees that they intended to treat the agreement as abandoned, so as to give them an opportunity of opposing the further progress of the bill: they left the trustees in the belief that their interests were secured, and they were enabled to carry their bill through the subsequent stages without opposition up to the Royal assent, which was given on the 6th of May.

Such would have been the case had the statements of Mr. Moss received no explanation; but Mr. Case has by his affidavit of the 11th of June, 1836, denied that he saw Mr. Moss on the 19th of April: he states that he was not then at Liverpool, and he says, that what Mr. Moss has represented as having passed between them, related to another proposition which had been made on the 11th, and not to that of the 18th of April, and that it took place at another time, and not on the 19th.

Mr. Rowson also makes an affidavit in reply, stating that after the proposal of the 18th of April, he used every exertion to communicate with the other members of the committee of the trustees; and a meeting of the 20th was regularly summoned, at which it was agreed to confirm the proposal of the 18th, of which fact he immediately gave Mr. Clay notice. Under these circumstances, I cannot hesitate to come to the conclusion, that the agreement entered into by Mr. Moss on the 18th became absolute by the acceptance and confirmation of it by the trustees. The only question therefore to be considered is, was it afterwards abandoned, or can the Railway Company be allowed to say,

they are not to be affected by what took place before the passing of the act? As to the abandonment, it is true that all this took place in 1833: that the Railway Company did nothing until 1836, to raise the activity of the trustees of the road: the latter thought, as they well might, that the question between the road and the railway had been finally settled; that whenever the Railway Company should be in a condition to cross their road, the terms would be adhered to; that they had no longer anything to discuss with the Railway Company; and it appears that they did insist upon the performance of the contract as soon as they had any reason to suppose that the Railway Company intended to make the bridge or viaduct inconsistent with the condition of the agreement.

But then the Railway Company contend, that they, being now a corporation, are not bound by anything which may have passed, or by any contract which may have been entered into by the projectors of the Company, before the act of incorporation. If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subject to the power of these incorporated Companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said, that the Company cannot be sued upon the contract; and that Mr. Moss entered into a personal contract, undertaking to procure from the Company when incorporated, a similar contract. It cannot be denied that the act of Mr. Moss was the act of the projectors of the railway,—it was therefore the agreement of the parties seeking an act of incorporation, that, when incorporated, certain acts should be done: the question is, not whether there be any legal binding contract at law, but whether this Court will permit the Company to use the powers under the act, in direct opposition to the arrangement with the trustees before the act, and upon the faith

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of which they were permitted to obtain such powers. If the Company and projectors cannot be identified, still it is clear that the Company have acceded to, and are now in possession of all that the projectors had before. They are entitled to all their rights and subject to their liabilities.—If any one individual had projected such a scheme, and in prosecution of it had entered into an arrangement, and then had assigned all his interest in it to another, there could be no legal obligation between those who had dealt with the original projectors and such purchaser; but in this Court it would be otherwise. So here,—as the Company stand in the place of the projectors,—they cannot repudiate the arrangement into which such projectors have entered in their corporate capacity: they cannot exercise the powers given by Parliament to such projectors, and refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld.

The East London Water-works Company v. Bailey (a), was cited, to shew that corporations were not liable for the acts of their agents, unless authorized under their common seal; but it does not follow that corporations are not to be affected by equities, however created, binding those to whose position they have succeeded, or affecting the property over which they claim to exercise control. What rights have the Company at all? Powers under the act have given them rights, but before those rights were so conferred, it had been agreed, that they should be only used in a particular manner. Can the Company therefore exercise these rights without regard to such agreement? I am clearly of opinion they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the Vice-Chancellor is in my opinion proper, and that the motion to dissolve it must be refused with costs.

(a) 4 Bingh. 283.

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The case of *The Vauxhall Bridge Company v. Spencer* (a), was relied on by the trustees, and it certainly is a strong authority in favor of their claim, Lord Eldon having in that case expressed an opinion, that withdrawing an opposition to a bill in Parliament was a good consideration for a bond, and having admitted the right of an incorporated Company to connect itself with a contract made by the projectors of the Company before the act of incorporation.

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Dance v. Girdler (b) was cited for the Railway Company, but that was an attempt to make a surety liable beyond his contract, and Sir James Mansfield relies much upon the want of identity between the society with whom the contract had been made, and the corporation afterwards created; and the question related to a legal liability and not to an equitable right.

It was contended for the Railway Company that to enforce this, would be injustice to the shareholders of the Company, who had no notice of such an arrangement, to which two obvious answers can be given:—First, that the Court cannot recognize the rights of individuals interested in the corporation, but must look to the rights and liabilities of the corporation itself. Secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the act; for although it provides that the bridge shall not be less than fifteen feet, it does not provide that it shall not be fifty. The Company might under this act clearly have agreed, that this or any other bridge should be fifty feet wide. It cannot be necessary to observe upon the alleged circumstance, that Mr. Case said, that there was no agreement: he could not release or destroy the agreement, if it in fact existed; and he explains the circumstance by shewing that there was a misapprehension as to the time when it took place, and as

(a) Jac. 64.

(b) 1 New. Rep. 34.

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to what it related to: neither can it be of any importance that Edwards on the 19th was not prepared to agree: he did agree that a meeting should be held for the purpose of coming to a conclusion, and although he did not attend that meeting, he did not and could not dispute the power of those present to come to a final decision, and he states himself, that he did assent to the proposed arrangement.

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 June 2nd.
 1839.
 24th, 25th
 January.

BETWEEN THE PROVOST and COLLEGE ROYAL
 of the BLESSED MARY of ETON, near
 Windsor, - - - - - Plaintiffs,
 and
 THE GREAT WESTERN RAILWAY COM-
 PANY, - - - - - Defendants.

A Bill for in-
 corporating a
 Company for
 the formation
 of a railway was
 pending in the

House of Lords. In consequence of a petition presented by Eton College, against the bill, the following clauses were introduced:—

Section 99, enacting, that it should not be lawful for the Company to alter or divert any part of the line of railway as then laid down, nor to make any other railway, tram-road, or other road or way to the south of the line, within three miles of Eton.

Section 100, enacting, that it should not be lawful for any Company or person, to form, make, or lay down any branch railway, or tram-road, or other road or way whatever, passing or approaching within the same limits.

Section 101, enacting, that no depot, station, yard, wharf, waiting, watering, loading or unloading place, should be made within the same distance.

Sections 102 and 103, enacting, that the Company should erect and maintain a fence on each side of the Railway, within certain parishes, for a distance of four miles; and should maintain a police for preventing all access to the railway by the scholars of Eton.

Eton College continued their opposition until the bill, including the said clauses, passed into an act.

The Company diverted an existing road within the prescribed distance, and fenced off and appropriated part of the site of such former road as a passage communicating with the railway, by which passengers were invited to pass on foot to and from, and to be taken up and set down by the trains stopping at the end of such passage. They also hired two rooms in a public house erected at the entrance of such passage, and the same were used as a booking office and waiting place, in the same manner as the station houses of the Company were used.

Held, by the Vice-Chancellor, that the act did not prohibit the Company from taking up and setting down passengers at that place.

Held, by the Lord Chancellor, that in this case, there being nothing of a parliamentary contract between the parties, the Company were entitled to exercise the powers given by the act in any manner not therein prohibited.

That the passage in question was not a road within the meaning of the 100th section.

That the house in question was not a station or waiting place within the meaning of the 101st section.

the provost and college were duly incorporated by the name aforesaid, and have ever since, under and by virtue of the said letters patent, had and kept, and still have and keep, a public school for the education of youth at Eton; and by reason of the situation of the school, and of the care and pains which have been bestowed by the provost and college in and about the management and discipline of the school, the same was, and had been for many years before the year 1835, and still is one of the most eminent and useful places for the public instruction and education of youth in these realms, and was and is greatly resorted to by scholars.

That, previous to and in the year 1835, a scheme had been projected by certain persons for constructing a railway from Bristol to London, by means of subscription, in the nature of a joint-stock company; and in the early part of that year a bill was brought into the Commons House of Parliament, for the purpose of incorporating the projectors and subscribers into a company, under the name of the Great Western Railway Company, and for enabling the Company to make the railway under the sanction and authority of Parliament; and it appeared by such bill, and by the maps, or plans, and books of reference, which had been deposited by the projectors or subscribers with the clerks of the peace for the several counties through which the railway was intended or proposed to be made, that the railway would pass through the parishes of Langley, Marish, Upton cum Chalvey, Stoke Poges, Farnham Royal, and Burnham, in the county of Bucks, (all of which parishes are in the vicinity of Eton College), and that the railway should pass through or near to the village of Slough, which is situate in the parishes of Upton cum Chalvey and Stoke Poges, and is within one mile and a half of Eton College. That it was stated to be the intention of the projectors of the railway, that a depot or station should be made in or near to the village of Slough. That the plain-

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tiffs believed and apprehended that the consequences which would ensue from the formation of such railway in the manner projected, would be dangerous to the safety of the scholars of Eton College, and injurious to the College and to the discipline of the school; and in particular, that if any station, or waiting place or places, for taking up or setting down passengers, by or on the railway, were permitted to be formed at or near to Slough, or at any other place within the said several parishes, and within three miles of Eton College; or if any road or way communicating with the intended railway from the south, and towards or approaching Eton College, should be permitted to be made, one of the consequences of such station, or waiting place, or road, or way, might be to make Eton a thoroughfare to and from the railway; and that unless the intended railway was securely and properly fenced throughout that part of its course which was to pass through the said several parishes, great danger and inconvenience might ensue to the scholars. That the plaintiffs, therefore, determined to oppose the progress of the bill, and accordingly presented petitions to parliament for that purpose; and in one of such petitions the plaintiffs stated, that being placed as they were and are by the statutes of their royal founder, in trust for the superintendence of the College, and being deeply interested in every thing that related to the school, which is an essential part of that foundation, they feared that from the proximity of the intended railway, as also from the increased number of carriages which would be constantly passing through Eton to and from the proposed depot at Slough, great danger would arise to the scholars, and that a door would be opened to many breaches of discipline, which, as they could not be effectually guarded against, would be highly detrimental to the best interests of the College and school, and of those who were sent thither for the purposes of education; and they therefore prayed that the bill might not pass into a law.

That in consequence of such opposition, various applications were made by or on the behalf of the persons who had projected or subscribed to the undertaking to the plaintiffs, for the purpose and with the view of inducing them to withdraw their opposition; and the plaintiffs having explained to the persons by whom such applications were made the grounds of their opposition, and having stated that they did not object to the formation of the railway, if the same could be made and constructed in manner, and with provisions and restrictions which would protect the College and school of Eton from being prejudiced or injured by means or in consequence of such railway, the projectors professed and expressed a desire so to form the railway as to obviate the objections of the plaintiffs and the grounds of their opposition.

That, in June, 1835, while the bill was pending in Parliament, Mr. B. Shaw, the chairman of a committee appointed by the projectors or subscribers, wrote and sent a letter to the Provost of Eton College on the subject of the railway, and with a view of inducing the plaintiffs to withdraw their opposition to the bill, and to consent to the introduction of such clauses into the bill as would afford effectual and certain protection to the plaintiffs, and as would prevent the possibility of the railway, or the works thereof, or connected therewith, from becoming in any manner injurious to the plaintiffs, or to the interests or welfare of the school, and also with the view and for the purpose of alleging and representing to the parliamentary committee before which the bill was then depending, that the projectors and subscribers had offered to submit and agree to the introduction into the bill of all such clauses and provisions as could be reasonably desired by the plaintiffs for the protection of the College. [The letter, after certain preliminary remarks as to affording the desired protection to the College from the apprehended consequences of the proximity of the railway, made proposals to the

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following effect : “ A proviso to be introduced as an amendment to a clause in the bill, specially preventing the making and connecting any branch whatsoever with the Great Western Railway, by any company or person within the distance of three miles in a direct line from Eton College, without the consent in writing of the Provost and Fellows. That no depot shall be made at Slough, nor within two miles thereof, in either direction on the railway. That a close, fence, or wall, shall be constructed on both sides of the line within the same distance. That a sufficient and satisfactory police shall be maintained at all times within the same distance by the Company, to be appointed by, and subjected to, the control of the Provost and Fellows, for the purpose of preventing or restricting under their orders all access to the railway for the scholars of the College. In the event of these terms being satisfactory to the Provost and Fellows, the Directors cannot doubt they will signify their acquiescence in the arrangement by a declaration, through their counsel or agent in the Committee of the House of Lords, when the promoters of the bill will proceed to carry it into immediate effect.”]

That the projectors or subscribers alleged, before the Committee of the House of Lords, in answer to the opposition of the plaintiffs, that they were ready and willing to remove the grounds of such opposition ; and the said letter was produced, for the purpose of making it appear that it was practicable to do so, by additional enactments in the bill.

That, thereupon, it was suggested by some member of the committee, that clauses might be introduced into the bill which would carry into effect the proposals contained in the said letter, and thereby effectually protect the plaintiffs against any inconvenience or injury, to be occasioned by the formation of the railway ; and such suggestion having been adopted by the committee, several clauses

were drawn up on behalf of the plaintiffs, and were agreed to by the committee, and were ordered to be inserted in the bill, which was thereupon agreed to by the committee.

The bill then stated the act of Parliament for making the Great Western Railway, (ante, p. 1), That it was by the 99th section of the act enacted, that notwithstanding any thing in the act contained, it should not be lawful for the company to alter or divert in a southern direction, any part of the line of railway, in the parishes of Langley Marish, Upton cum Chalvey, Stoke Poges, Farnham Royal, and Burnham in the county of Bucks, as then laid down in the plan thereof, deposited with the Clerk of the Peace for the county of Bucks, further than to the extent of one hundred yards; nor to form, make, or lay down, or aid, encourage, or in any manner assist or concur in forming, making, or laying down, any other railway or tram road, or other road or way whatsoever, to the south of the line, passing or approaching within three miles of the College of Eton, and communicating with the railway thereby authorized to be made, without the consent of the Provost and Fellows for the time being, of the said College of Eton, to be signified by some writing under their corporate seal.

That by the 100th section it was enacted, That, notwithstanding any thing in the act contained, it shall not be lawful for any Company, or any person whomsoever, to form, make, or lay down, any branch railway or tram road, or other road or way whatever, passing or approaching within three miles of the College of Eton, and communicating with the railway thereby authorized to be made, without such consent of the said Provost and Fellows, as hereinbefore mentioned.

That by the 101st section, it was enacted, That no depôt, station, yard, wharf, waiting, watering, loading, or unloading place, should be made or constructed by the Company, within the said several parishes in the county of Bucks, being within three miles of the College, without such con-

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sent of the said Provost and Fellows as hereinbefore mentioned.

That it was by the 102nd section enacted, That the Company should, and they were thereby required, at their own expense, to erect, and at all times hereafter to maintain and keep in perfect repair, a good and sufficient fence on each side of such part of the railway as should pass through the said several parishes, in the county of Bucks, for the distance of four miles.

That it was by the 103rd section enacted, That the Company should, at all times, at their own costs and expenses, in every respect, maintain a sufficient additional number of persons, for the purpose of preventing or restricting all access to the railway, by the scholars of Eton College, whether on the foundation or otherwise, on such part of the railway as was thereinbefore directed to be fenced off; and that such persons should be appointed by the directors of the company, subject always to the approval of the Provost and Head Master, or either of them for the time being, of Eton College, and should be of such number as the Provost and Head Master, or either of them should think requisite and determine: and should in every respect be under the orders, control, and direction, and should be liable to be dismissed by the Directors, upon the representation and demand of the Provost and Head Master, or either of them.

[The bill, then, after noticing the fact of part of the railway from London to Maidenhead, having been opened and used for public travelling since the month of June, 1838, proceeded].

That, before the passing of the act, there was a public road leading from Slough, which is on the southern side of the railway to Stoke Poges, on the northern side thereof; and which road crossed the line of the railway, as the same was described in the maps or plans, and books of reference mentioned and referred to in the act of Parliament; and

the Company have, under the powers of the act, diverted the road and carried it over and across the railway, as the same has been formed and completed by the Company by means of a bridge or arch; and have, at their own charges and expenses, formed or made and laid down a road or way, on the eastern side of the public road so diverted, communicating at the point at which the public road had been so diverted, and leading to and communicating with the railway, and which road or way so formed or made or laid down, has been made and formed upon the site of the public road, as the same existed before it had been so diverted; but the surface of such former public road has been lowered or levelled by the Company, or at their expense, and has been made to slope or incline towards the railway, and they have built a fence upon the eastern side of the road or way, and have formed a bank on the western side thereof, and have put up a rail or barrier at or near each end of the road or way, and have, since the month of June last, stationed and kept men in their service or employment, for the purpose of regulating the admission and departure of passengers and persons coming to and from the railway, by means of the road or way: and that the road or way so formed, made or laid down, by the defendants, in fact, passes and approaches within three miles of the College of Eton, and communicates with the railway, and has been so formed or laid down, without the consent of the Provost and Fellows of Eton College, signified by any writing under their corporate seal, or in any other manner, and wholly against their wish.

That since the month of June, 1838, the company have caused their trains and carriages, passing and plying along and upon the railway, to stop and wait daily at or near to the end of the road or way last mentioned; and have there daily taken up and set down, and still daily take up and set down, passengers travelling upon the railway, which passengers have passed and approached, and daily continue

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to pass and approach to and from, and to communicate with, the railway by means of such road or way.

That, at or near the southern extremity of such road or way, and near to the village of Slough, there has been built and constructed within the last six months, and since the passing of the act, and there now is a public house, which is used and resorted to by persons travelling and passing by the trains and carriages of the Company; and a part of such public house is and has been, ever since the 6th of October, 1838, occupied and used by the Company as a booking office, for the persons so passing and travelling by and upon the trains and carriages of the Company, and for the depositing of goods, carried by them upon and along the railway; and the Company have at such booking office, ever since the 6th of October, 1838, kept, and now keep, clerks and other persons in their service and employment, for the purpose of receiving; and such clerks or other persons have received, and continue daily to receive, the fares of persons travelling by the carriages and trains of the Company upon the railway, from the point where such road or way communicates with the railway, and issue and deliver tickets or vouchers for the payment of fares to persons so travelling.

That, on the outside of the booking office, there are two boards fastened to the walls thereof, on one of which is painted a list or account of the fares charged by the Company for the conveyance of passengers by the railway; and on the other, the rules and regulations of the Company for such passengers.

That, in the windows of the booking office, there are also placed, lists of fares for such passengers, and accounts of the times at which the trains leave London and Maidenhead: that, in front of the public house at Slough, a verandah has been constructed and built, extending the whole length of such public house, and including the front of the booking office of the Company, and which verandah is upon

the same plan, and is in the same style, as those built at the stations of the Company at West Drayton and Maidenhead: that such public house was originally built without such verandah, and was used for some time before the verandah was constructed; and the same was built either altogether or partly at the expense of the Company, or has been since paid for by them; and such public house has been constructed principally with a view to the same being used by the passengers and persons intending to travel by the railway from the point near Slough; and the omnibuses and coaches which convey the passengers from Windsor and Eton stop at the public house and booking office, and frequently arrive there a quarter of an hour before the railway trains reach the point of the railway at or near Slough, and such passengers usually or frequently wait in the public house until the trains arrive at such point.

[The bill then stated that a booking office was kept at Windsor for receiving fares, and issuing tickets, to persons intending to travel on the railway, and who only were permitted to pass along the said road or way or thereby communicate with the railway].

That, by such means and in such manner, and without the consent of the Provost and Fellows of the College of Eton signified in any manner, and contrary to their wishes, the Company have, in fact, made at the place where the road or way abuts upon, or communicates with the railway, and at the northern extremity of such road or way, and between such northern extremity and the railway, which is situate within the parishes of Upton cum Chalvey and Stoke Poges,—and is within three miles of the College of Eton—a depôt, or waiting, loading or unloading place.

That the Company have published and circulated advertisements respecting their railway, and announcing the hours of each day at which the trains and carriages depart from London and Maidenhead; and they have thereby announced, and the fact is, that all such trains, except two,

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call at Slough, which is distant from the place at which the said road or way communicates with the railway, 320 yards or thereabouts: and by the word “Slough” as used in the advertisements, the Company mean and intend the place at which the road or way communicates with the railway; and at or near to the place where such road or way communicates with the railway the Company have caused to be set up four posts with lamps, and a board with the word “Slough” painted thereon, in letters, similar in colour, character, and size, to those used and adopted by the Company in other places, for the purpose of pointing out and describing the several stations.

That the depôt, or waiting, loading, and unloading place so made by the Company, is, in fact, a station, and the Company have only forborne to call and describe the same by the name of a station, in the hope and endeavour of being thereby enabled to evade the provisions of the act.

That since the railway was opened for the carriage of passengers and goods, a great number of passengers have been from time to time set down at, and taken up from, the place at which the said road or way communicates with the railway; and, in consequence, there has been a frequent traffic and passage of public and other carriages and vehicles through the town of Eton, and through and in front of the College, for the use of persons resorting to and passing from the railway; and during the summer and autumn of the year 1838, the number of omnibusses, coaches, and other public vehicles, passing through Eton, and used for conveying passengers to and from the railway, exceeded eight, and usually passed through Eton seven times in the course of each day, and often more frequently; and the privacy and quiet which the College enjoyed before the making of the railway has been destroyed; and the College of Eton has been made, and is a thoroughfare for the passage of persons resorting to and coming from the railway; and the passage of such carriages and vehicles has been and is highly dangerous and injurious to the scholars of

Eton College, and is likely, if the same shall be permitted to continue, permanently and irreparably to injure and deteriorate the character and reputation of the College, and to prejudice and affect the interests of the plaintiffs.

That the use so made by the Company of the road or way, and the waiting for and loading, and unloading passengers and goods, by and from their trains and carriages on the railway, have occasioned, and will, if allowed to continue, further occasion the evils and injuries to the plaintiffs, which it was the object of the said clauses to prevent, and the Company have wilfully violated, and sought to evade, the clauses and provisions of the act.

The bill charged that certain communications on the subject between the plaintiffs and the Company, had been expressly made without prejudice to the right of the plaintiffs to apply to the Court of Chancery for an injunction.

The bill prayed that the Company may be restrained by the decree of this Court, and may in the meantime be restrained by the order and injunction of this Court from using or continuing to use by themselves, their agents, officers, contractors, servants or workmen, or to permit any passengers or other persons travelling upon the said Railway, to use the road or way, hereinbefore mentioned to communicate with the said Railway, for the purpose of thereby communicating with the said Railway, or any other road or way communicating with the said Railway, within the Parishes of Langley Marish, Upton-cum-Chalvey, Stoke Poges, Farnham Royal and Burnham, within the County of Bucks, but within three miles of Eton College, without the consent of the Provost and Fellows, for the time being of the said College of Eton, to be signified by some writing under their corporate seal, and that the said defendants may be in like manner restrained from using or continuing to use by themselves, their agents, officers, contractors, servants or workmen, the depôt or place at which the said

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road or way lastly before mentioned communicates with the said Railway, for the purpose of waiting with or loading or unloading the carriages or trains travelling or passing along the said Railway, and from taking up or setting down passengers or goods at the place last mentioned, upon by or from such carriages or trains or any of them, and that the said defendants may in like manner be restrained from permitting to be made or used, any place for waiting or for loading or unloading any trains or carriages to be used upon the said Railway, and from waiting with or loading or unloading any trains or carriages, and from taking up or setting down any passenger or passengers, goods, wares, or things, by or from any trains or carriages to be used upon the said Railway, at or near Slough aforesaid, or otherwise within the said Parishes of Langley Marish, Upton-cum-Chalvey, Stoke Poges, Farnham Royal and Burnham, being within three miles of the said College, without the consent aforesaid, and from in any other manner infringing upon or violating the provisions of the said act of Parliament, and that for the purposes aforesaid, all proper and necessary directions and orders may be given and for further relief.

The plaintiffs had in June, 1838, exhibited an information against the Company, seeking to restrain them from setting down or taking up passengers at Slough, and a motion for an injunction for such purpose was on the 2nd of June, 1838, made before the Vice-Chancellor.

The Solicitor-General, and *Mr. Bacon*, for the motion.

Mr. Knight Bruce, *Mr. Jacob*, and *Mr. Osborne*, appeared for the Company, but were not called on to address the Court.

June 2nd.

THE VICE-CHANCELLOR.—I think that by the expres-

sions in the act of Parliament, something more is meant than merely a place at which a carriage may occasionally stop.

In the 80th section it is directed, that it shall be lawful for the Company to contract for the purchase of land, not exceeding in the whole fifty acres, in addition to the lands hereinbefore authorized to be taken and used, in such places as shall be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading, and unloading places.

Now, supposing the railway is made, if the mere stoppage of the carriage on the railway makes the place where it stops a waiting or unloading place, I think the fifty additional acres never could be necessary; but what is clearly pointed out, is, that besides the spot on the railway, a which the carriages may stop, in order to construct a station or waiting place there is to be land on one or both sides of the railway, on which there shall be erected some sort of building or machinery, or something which shall contribute to the opportunity and to the ease of waiting, loading, and unloading. I think that those words to which my attention has been particularly called, apply not to occasionally stopping, or occasionally putting out, a passenger, but to making something of a permanent kind in the nature of a building (a), which might be in various forms, and used for various purposes, beyond the mere fact of the railway passengers stopping at this particular point.

It seems to me, if it had been meant to be said, that none of the Company's engines shall stop on any part of the road at Slough, or within four miles of Slough, or within a definite distance of Eton, there might have been a clause introduced to that effect, and all doubt and difficulty would have been taken away; instead of which, the clause

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(a) At the time when the motion was before His Honor, the house at Slough had not been erected.

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alludes to the making of a place for stopping, and not the preventing of an occasional stopping at this point.

The plaintiffs intending to appeal to the Lord Chancellor against this decision, certain correspondence, with a view to an amicable adjustment of the dispute, took place between them and the Company.

No arrangement having been come to, the plaintiffs dismissed their information and filed the above bill; and, by the permission of the Lord Chancellor, gave notice of an original motion for an injunction before his Lordship.

The defendants filed affidavits in opposition to the motion, and by one of such affidavits, Mr. Saunders, the secretary of the Company, set forth the following definitions of the words, “depôt,” “station,” “yard,” “wharf,” “waiting-place,” and “watering-place:”—

That a “depôt” when made and constructed, is generally understood to consist of warehouses and sheds, cranes, offices, waiting-rooms, workshops, and other conveniences for passengers, and for the repair of engines and carriages, and for supplying the engines with water and fuel, together also with other erections, buildings, and conveniences; and also containing sidings and turnouts, or side lines of railways upon which engines, carriages, and trucks, can remain in repose and ready for immediate use or otherwise, without obstructing or endangering the traffic on the main line; and also turn tables or conveniences for the purpose of enabling engines and carriages to be turned round upon the railway, or more conveniently removed from one line of rails to another, and for putting stage coaches, private carriages and horses upon the railway, or removing them therefrom.

That a “station” is generally understood to consist of platforms for the landing, loading, and unloading of passengers and goods to and from the trains, without using the steps of the carriages; sheds, or coverings, for protection from the weather; offices, waiting rooms, and other conveniences for passengers, and for the reception of goods; also

sidings or turn-outs, and occasionally turn-tables, and other conveniences, similar to that contained at a dépôt, though to a more limited extent.

That a “yard” is understood to mean a large and more open space for the reception or stowing of carriages, trucks, and materials used for the repairs of the railway, and for such like purposes.

That a “wharf” is generally understood to mean a place for the landing of goods from boats, barges, or vessels.

That a “waiting-place” is generally understood as comprising waiting rooms and other conveniences for passengers, with a platform to enable them to enter and leave the carriages without the difficulty of ascending or descending by means of the steps.

That a “watering-place” is where the engines are supplied with water when requisite; and that “loading and unloading places” are generally understood as comprising platforms, warehouses, sheds, or coverings, offices, sidings, or turn-outs, turn-tables, cranes, and other conveniences, necessary for the loading and unloading of goods and cattle and carriages upon and from the railroad.

The *Solicitor-General* and Mr. *Bacon*, for the motion.—The plaintiffs had actively opposed the progress of the bill authorizing the formation of the railway, and the Legislature resolved that certain clauses should be introduced for protecting the interests of Eton College and School. The opposition was founded on apprehensions that facilities would be afforded to the scholars to obtain access to the carriages of the Company, and the discipline of the school be thereby injured; and also that the passing and repassing of vehicles to and from the railway would destroy the comparative privacy of the town of Eton. That these were the evils which the plaintiffs apprehended is clearly proved by the evidence given in their behalf before a Committee of the House of Lords; and the letter of Mr. Shaw shews that

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such was the understanding of the Company:—to effectually prevent these evils was therefore what the Legislature proposed. It must, however, be admitted, that the opposition of the plaintiffs did not cease with the introduction of these clauses into the bill, but continued up to the time when the act received the Royal Assent; and so far it must be conceded that the Company have not violated any agreement between themselves and the plaintiffs.

A parliamentary contract was, however, made between the Company and the public, to which the former must be strictly held; the real meaning of the act must not be evaded by any suggested ingenuity of construction, nor must the real meaning of the words used be explained away by engineering or scientific definitions. The complaint is, that the Company have acted contrary to the provisions of these clauses.

First, this is a road or way clearly made by the Company; it is attempted to be shewn that it is only part of an old or diverted road, but the diverted road made by the Company represents the entire old existing road, and to continue the use of part of any old road is equivalent to making a new one.

A station has been established at Slough, at which, with two exceptions, all the trains daily stop to set down and take up passengers. The words of the 101st clause are, “That no depôt, station, yard, wharf, waiting, watering, loading, or unloading place, shall be made or constructed by the Company.” Is the meaning of the words “make or construct” to be evaded by saying, that the Company only “hire” the two rooms in this public house, to the building of the verandah of which they have at least contributed? It is sought by a technical definition of the word “station” to shew, that the place in question does not possess those conveniences for passengers which are attributed to places of a similar description; but if it is intended to be insisted that the Legislature meant to authorize the making or con-

structing of an "inconvenient" and not a "convenient" station, such an argument would, from the impossibility of that being the intention of the Legislature, in effect admit that no station whatever was to be made. It cannot be disputed that this is a "waiting place." Policemen are stationed at the spot, who admit passengers, producing tickets, within the enclosed space for the purpose of awaiting the arrival of the trains, and passengers are expressly desired and cautioned to be at the place where the trains stop at least five minutes before the time advertised for the arrivals of the carriages.

By the 102nd section, the Company are bound to erect, maintain, and keep a fence on each side of the railway for the distance of four miles ; the only construction that can be put upon this clause is, that it is to be such a fence as will effectually prevent all access to the railway within these limits.

Mr. Jacob, Mr. Wigram, and Mr. Osborne, contra.—There is no evidence to shew that the clauses in question were introduced to prevent what the bill now seeks to restrain ; true it is that the plaintiffs had presented a petition stating their fears and apprehensions of the results of passing this act, but the inference is, not that these clauses were intended to meet those specific evils, but to afford such protection to the interests of the College and School of Eton as in the view of the Legislature seemed requisite ; had it been otherwise, the Company would simply have been prohibited from taking up or setting down passengers within three miles of Eton. Such was the view which the Vice-Chancellor took of the case. "If," said his Honor, "the intention of the Legislature was to prevent any access whatever to the railway, why do I not find, instead of these elaborate enactments, one short clause, prohibiting the Company from taking up or setting down passengers?"

It is admitted, that no agreement with the plaintiffs has

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been violated, no implied faith broken, and therefore no relief in the nature of a specific performance can be asked; the question must depend on the construction of the act of Parliament, and on that alone.

The act contemplated the Company in two different views, and incorporated them for two distinct purposes: 1st, as makers and constructors of, and 2nd, as carriers of goods on, the railway. It is in the first of such characters that these clauses affect them. The 163rd section enacts, that all persons shall have free liberty to pass upon and use the railway with carriages on payment of tolls to the Company. The Company may discontinue their trains and carriages, and there is nothing to restrict their lessees, or private individuals, from taking up and setting down passengers at the place in question: unless the plaintiffs can shew that such a use of the railway is altogether prohibited, the restriction contended for will be inoperative, and statutory enactments are never intended to be nugatory.

The allegations in the bill amount to this, that the Company have made a private road or way, but the words of the 99th section contemplate public roads or ways. The 106th section provides for the making of conveniences for the owners or proprietors of lands severed by the railway; if, therefore, the 99th section be not read to mean public roads or ways, the Company would be prohibited from making, within three miles of Eton, any facility of communication to lands which might be severed within those limits.

It is said that the Company have made a station at a prohibited place, but if the act is to furnish the rule as to what the Company are permitted to do, or restricted from doing, such is not the fact. The Legislature contemplated a "making or constructing" by the Company for the purposes of the railway. The 80th section authorizes the Company to purchase fifty acres for the "making" of additional stations; the 82nd and 83rd sections provide that

the Company shall not “construct or make” stations on certain parts of the line, and these are the words used in the 101st section. The act of building this house was not the act of the Company but of the proprietor, who can at any time determine the tenancy subsisting between him and the Company.

The object of the 102nd and 103rd clauses was to prevent the Eton scholars trespassing on the railway, not to restrict persons resident in the neighbourhood having the advantages of this mode of conveyance.

In point of form an injunction cannot be granted. An injunction may issue to prevent a thing being done, but not to prevent the use or consequence of what has been done. *Deere v. Guest* (a).

Supposing an injunction be granted,—passengers might still be set down or taken up on the north side of the railway: this Court will not grant a nugatory injunction: how is such an order to be framed or drawn up? If this were a violation of the act an indictment for a misdemeanour would lie.

The *Solicitor-General*, in reply.—It is said that the 99th section, if construed to refer to private and not solely to public roads or ways, would prevent the making of communications between lands severed by the railway; it is not so: the words of that clause mean the enabling a person to go upon the railway contrary to the spirit of these clauses. It is said that the terms of an injunction may be avoided by passengers passing to and from the railway, on the north instead of the south side, but it is not shewn that the Company can procure land for this purpose, and in all these acts the Legislature limits a time, beyond which these Companies shall not have power to take or purchase land.

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THE LORD CHANCELLOR.—These clauses were obviously framed for the purpose of preventing the evils which are said to exist. I cannot conceive any other reason for them: but the question is, not whether these clauses had this intention, but whether they are so framed as to effect the proposed object.

I do not think it is necessary to say anything about the title of the plaintiffs to sue; there may be sufficient allegation of property on the face of the bill to sustain it at the hearing of the cause, but, before this Court could interfere by injunction, it would require to be satisfied that there is such an interest in property, in respect of which it ought so to interfere; and, assuming such an interest to be proved, the question would be, whether these clauses would amount to a parliamentary contract, which is the ground on which the Court interposes in these cases. The real question at present is, whether that which is proved to have been done is within the prohibition of these clauses; and I shall be very glad to find it is so, because the intention of Eton College is clearly expressed, and I think those who know anything of the establishment of Eton, must regret that any station, or whatever else it may be called, exists so near the College; but the question is, whether those who were solicitous to protect Eton College against the supposed evil, have or not effected their purpose.

Now, with regard to this piece of land, which is called a road,—looking at the two clauses, I cannot say that in either of them any restriction of the sort was contemplated. The 99th clause in the same terms as part of the 100th, but confined to the south side of the railway, says that the Company shall not lay down, nor assist in laying down, any railway or tram road, or other road or way whatsoever, passing or approaching within three miles of the College of Eton, and communicating with the railway thereby authorized to be made, without the consent therein mentioned. Now, a railroad or tram road is the principal thing pro-

hibited; the other words, "or other road or way are added," which would include every thing, "ejusdem generis," the terms are as general as possible, but they must at the same time be something, "ejusdem generis," with that which is the principal matter prohibited. I can only understand them to mean some new channel of communication by which the public might pass to the railroad. I find there was an existing old road coming in actual contact with the projected railway, and crossing it, although not exactly at a level, and unless therefore I can find any thing which prohibits persons in the neighbourhood of the railway from being permitted to go on it within that limited space, I cannot consider that this piece of land, which is only used for allowing persons to pass from the old road from Stoke to Slough on to the railway, can be construed as coming within the description to which I have adverted. It does not facilitate the communication from the other parts of the country to the railway: it only enables persons in the vicinity of the old road to descend from that old road to the railway. As to the next clause it is impossible to ascertain precisely what it means. If it is applied to all the world, and not merely to the Railway Company, that would not vary it, because it does not allude to the northern side of the railway. That being my opinion as to the meaning of the word road, it is not very material to consider whether the piece of land in question, used as a means of communication with the existing road, be to the north or to the south.

Then, if it is not a road, can it be called a station? It is not a road in the sense in which I apprehend the word is used in the 99th and 100th sections; it is a mere means of communication: and, if the Company had a right any where in the prohibited districts to make a communication to permit persons to descend from their own lands, or from a public road to or upon the railway, then they had a right to permit them to pass over the piece of land in question.

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The title to that piece of land is not in evidence, but the dominion over it is stated. The affidavits state that the defendants have made this road convenient for the purpose for which it is now used; but still it is not a road within the meaning of the act; it is a mere passage or path, not accessible to carriages but to foot passengers only, and a means by which persons are enabled to come from the old road between Slough and Stoke down to the railway.

If it is nothing more than a mere path, how can it be a station or a waiting place? It does not seem to me to resemble the one or the other,—though I am not bound to take the definition which the Company themselves give of a station or waiting place,—I find persons are not permitted to, and do not wait, but they are permitted at certain times to pass over the piece of land, which it is very convenient to them to pass over in order that they may descend from a place,—at which, not being the property of the Company they have a right to wait,—to the railway, for the purpose of being taken up by the trains which stop there for that purpose: it is a mere passage way; it is nothing which can be called a station or a waiting place. In saying this, I do not at all confine myself to the definition which the Company have given of those two terms.

With regard to the house, it is hardly attempted to be insisted that that is prohibited: it is not their property; and the real question comes to this, (and that is all, as it appears to me, that the Company have done, and all I could effectually enjoin them from doing in future so as to attain the object which Eton College has in view), whether they are or are not prohibited from stopping there and taking up and setting down passengers.

I have already said, my opinion is, there is nothing in the act to prohibit them from making a communication with the old road, to enable persons to come from the old road to the railway. If that be so, how can I restrain them from taking up passengers; or, if I were to restrain them from

doing so at this particular place, what is there to prevent them taking up passengers at some other place where they may choose to stop? The Legislature has not thought proper to impose that restriction.

It was attempted to be argued, that the provision for the fence or wall was to exclude all access to this place. It appears to me that was not the object of the clause; but that it was intended to prevent the Eton boys from getting on the railway and being exposed to the danger of the carriages coming unexpectedly upon them. There is no provision altogether preventing the company from taking up or setting down passengers, and, if that was what the College meant to prohibit, they have not succeeded to that extent. They have succeeded in preventing the Company from conveying carriages, and that has not been attempted; but they have failed in preventing the Company, although having no station and no waiting place, for all practical purposes making Slough the place of communication with Windsor and Eton. I should be very glad if I could find in the act anything that could enable me to say that the Company are not authorized to do this; the act enables them to do anything which is not inconsistent with its provisions, and I cannot find, if this was the intention, that it has been effectually expressed.

In this case, it is very important to observe, that there is nothing of contract between the parties. If upon the proposals the College had retired from the contest, and had acquiesced in the provisions of these clauses, supposing that they would effect their purpose, it might have been a subject for consideration whether these acts were not an evasion of the contract, which in that case would appear to exist between the College and the Company,—such is not the case: both parties were entirely at arms length. The company have a right to exercise every power which is given to them by the act, in any manner not prohibited by the act, and Eton College cannot restrain them from

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doing anything, unless they can shew that the Company are acting contrary to the provisions of the act. I cannot say any of the acts brought before me in evidence are of a nature which are prohibited by this act, and therefore I must refuse this motion with costs.

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 January 19th. WAY COMPANY, - - - - - Plaintiffs.
 and
 THE COMPANY OF PROPRIETORS OF THE
 GRAND JUNCTION CANAL, - - - Defendants.

A Company were empowered by an act of parliament to do all works necessary and convenient for constructing a railway, and among others to cross canals and make embankments in the line; and in particular

THE bill stated, the act of parliament incorporating the London and Birmingham Railway Company (*a*), and that they were thereby empowered to make and maintain the railway with all proper works and conveniences connected therewith in the line or course, and upon, across, under, or over the lands delineated on the plan, and described in the

(*a*) *Ante*, p. 120.

to cross a canal of which the defendants were the proprietors, and to make an embankment over a valley near the same place.

Subsequent clauses in the act restricted the Company from doing anything which should obstruct the navigation of the canal, or any part thereof; and specified the height and dimensions of any bridge to be made and maintained for carrying the railway over the canal.

The Company, for the purpose of transporting earth from the higher lands on the south to the lower land on the north side of the canal for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal.

The defendants pulled down such bridge, and thereby destroyed the passage of communication for the carriage of the earth.

Held, by the Master of the Rolls, on a motion for an injunction to restrain the defendants destroying any such bridge, or preventing such communication, that the clause empowering the Railway Company to cross canals in the progress of their works was not restricted by the subsequent clauses which applied to permanent bridges; and His Honor therefore restrained the defendants from obstructing the making or use of such passage of communication.

The plaintiffs having offered to undertake not to interfere with the canal, otherwise than as authorized by the act, such undertaking was adopted by the court, and will have the effect of an injunction, so far that the defendants will be enabled to make any infringement thereof the subject of an application to the court.

Although a railway company are not to act capriciously in regard to carrying out the powers of an act of parliament, the act constitutes them the judges of the most convenient mode of conducting their works.

book of reference deposited with the respective clerks of the peace for the several counties therein mentioned.

That by the 8th section of the act, it was amongst other things enacted, that for the purposes and subject to the provisions and restrictions of the act, it should be lawful for the plaintiffs, their agents and workmen, and all other persons by them authorized, and they were thereby empowered to enter into and upon the lands of any person or corporation and whatsoever, to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of the act such parts thereof as they were by the act empowered to take or use, and in or upon such lands, or any lands adjoining thereto, to bore, dig, cut, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which might be dug or obtained therein, or otherwise, in execution of any of the powers of the act, which might be proper or necessary for making, maintaining, altering, repairing, or using the railway and other works by the act authorized, or which might obstruct the making, maintaining, altering, repairing, or using the same respectively according to the true intent and meaning of the act, and also to make or construct, upon, across, under, or over the railway or other works, or any lands, streets, hills, valleys, roads, railroads, or tram roads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as the plaintiffs should think proper, and also to alter the course of any rivers, canals, brooks, streams, or watercourses, during such time as might be necessary for constructing tunnels, bridges, or passages, over or under the same, and also to divert or alter the course of, or to raise or sink any roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway, and to make drains or conduits

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into, through, or under any lands adjoining the railway for the purpose of conveying water therefrom or thereto ; and also in or upon the railway, or any lands adjoining or near thereto, to erect and make such toll and other houses, warehouses, yards, stations, engines, and other works and conveniences connected with the railway, as the plaintiffs should think proper, and also from time to time to alter, repair, or discontinue the before mentioned works, or any of them, and to substitute others in their stead, and generally to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the railway and other works by the act authorized, they the plaintiffs, their agents, and workmen, doing as little damage as might be in the execution of the several powers to them thereby granted, and making full satisfaction to all persons and corporations interested in any lands which should be taken, used, or injured, for all damages to be by them sustained in or by the execution of all or any of the powers thereby granted. And that the said act should be sufficient to indemnify the Company and all other persons for what they, or any of them, should do by virtue of the powers thereby granted, subject nevertheless to the provisions and restrictions thereafter mentioned.

That by the 85th section of the act, after reciting that the railway was intended to be carried over or near to the Grand Junction Canal, or to the locks, embankments, side ponds, or other works thereof, in the parish of Wolverton, in the county of Buckingham, and the other parishes therein mentioned, it was enacted, that nothing in the act contained should diminish, alter, prejudice, affect, or take away any of the rights, privileges, powers, or authorities, vested in the company of proprietors of the Grand Junction Canal, or authorize or empower the plaintiffs to alter the line or level of the canal or towing path thereto, or any part thereof, or to obstruct the navigation of the canal, or any part thereof, or to divert any of the waters therein, or

which supply the canal, or to injure any of the works thereof, and that it should not be lawful for the plaintiffs to make any deviation from the course or direction of the railway, as delineated in the maps or plans deposited with the clerks of the peace of the several counties therein mentioned, by which deviation any of the locks, side ponds, towing paths, bridges, banks, or feeders, or any other works of or belonging to the Grand Junction Canal, or any part thereof respectively should be taken, used, or damaged, without the consent of the Canal Company, in writing, under their common seal, first had and obtained.

That by the 86th section, it was enacted, that in carrying the railway over the canal, the plaintiffs should, at their own expense make, and at all times thereafter maintain and keep in perfect repair, good and substantial bridges over the canal and the towing path thereto, with proper approaches to each such bridge, and the soffit of each such bridge should be at least ten feet above the top water level of the canal at the centre of the waterway; and no part of the arch over the towing path should be less than eight feet above the top water level of the canal, and each such bridge should be of such width and curve as should leave a clear, uniform, and uninterrupted opening of not less than twenty-two feet for the waterway, and eight feet for the towing path under each such bridge, and the plaintiffs should and were thereby required during the progress of constructing each such bridge over the canal, and of the necessary repairs or renewal thereof, from time to time, and at all times, to leave an open and uninterrupted navigable waterway in the canal, of not less than sixteen feet in width during the time of constructing and putting in the foundation walls of the abutment of each of the bridges, and of the new towing path along the same, up to one foot above the top water level of the canal, and which time should not exceed fifteen days; nor should less than twenty-two feet

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for the waterway and eight feet for the towing path be left during the remainder of the period of constructing or repairing or renewing each such bridge, and that the then present towing path should remain undisturbed until the new towing path wall should be erected, and the grounds made good and properly gravelled and open for the free passage of horses under each such bridge.

That by the 87th section it was enacted, that if by reason of any accident, or in the execution of any of the works by the act authorized to be made, or by reason of the bad state of repair of any such works, or of any bridge over the Grand Junction Canal, or of any of the slopes, banks, or walls of the railway near the canal, it should happen that the canal, or the towing path thereof, should be so obstructed that boats, barges, or other vessels, navigating or using the canal, should be impeded in their passage, or should not be able to pass along the same, or in case the navigable waterway and towing path required to be preserved during the progress of the works should at any time be contracted to a less width than therein prescribed, then &c. [The bill stated the remainder of the section, fixing certain penalties to be paid in any such case by the Railway Company as liquidated damages, and specifying the manner in which the Canal Company might recover the same.]

That the plaintiffs have commenced making the railway, and the works connected therewith, under and according to the powers and provisions of the act, and it is their intention to carry the railway over the Grand Junction Canal at Wolverton aforesaid; and in order to form and complete the railway at such place, and before the bridge by the act directed to be made over the canal can be built in the manner thereby directed, it is necessary to construct an embankment of earth, commencing at the distance of 150 yards from the south bank of the canal, and extending from the north bank to the distance of 2450 yards; and the

embankment when completed will consist of 927,000 cubic yards of earth; and in order to construct and complete the embankment it is absolutely necessary to carry 600,000 cubic yards of earth across the canal from several deep cuttings, which have been already commenced southward of the canal, and which must be carried across the canal from the south to the north bank thereof, and the embankment at the place where it is to cross the canal, is of the height of 13 feet above the water level of the canal. That the plaintiffs have begun to make the embankment, and in order to carry on the same, it is necessary to construct a temporary passage of communication over the canal for the transport of the earth and materials wherewith the embankment is to be made; and at the place where the materials and earth are to be so transported the canal is 45 feet wide, and in order to support the passage of communication, it is necessary that piles should be driven into the bed of the canal, but not so as to alter the line or level of, or to obstruct the canal or the towing path, or the navigation hereof, or to divert any of the waters therein, or which now supply the canal, or to injure any of the works of the canal.

That in the month of December last, the embankment was in progress, and had arrived at such a condition that it was then necessary to construct the said passage of communication over the canal; the embankment formed on the south side of the canal having arrived within twenty yards of the south bank; and the further progress of the embankment being stopped until such passage had been formed; and thereupon the plaintiffs, on the 23rd of December, 1834, caused piles to be driven into the bed of the canal, and also other piles or supports to be driven into the land, on the north side of the canal, for the purpose of sustaining the necessary passage of communication, and caused beams to be laid and fastened from the first to the second mentioned piles or supports, for completing the said passage: and the several works were begun on the 23rd of

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December last, and were completed by noon on the 25th of the same month.

[The bill then alleged in detail, that all the stipulations of the 85 and 86th sections had been complied with.]

That, while the said works were in progress, and after they were completed, and until the same were destroyed by or by the orders of the canal proprietors, persons were stationed by the orders of the plaintiffs during the day and night to watch, and a light was kept burning during the night time, to prevent the possibility of any accident or inconvenience happening, or any obstruction arising therefrom, to persons navigating boats or other vessels on the canal, or the towing-path.

That, after the passage of communication had been so formed, and on the morning of the 30th of December last, Mr. Lake, an engineer of the defendants, accompanied by a party of men employed by the defendants, proceeded to the said works; and Mr. Lake measured the clear waterway between the piles and the towing-path on the opposite bank of the canal, and also measured the height of the beams so laid across from the surface of the water in the canal, and having done so, ordered and directed the men to pull down the same, which was accordingly done; and they also pulled up the piles which had been driven, and thereby wholly demolished the passage of communication, whereby the progress of the embankment has been stopped, and the plaintiffs prevented from carrying on their works, and proceeding to complete the railway.

That the defendants refuse to permit the plaintiffs to reinstate the works so destroyed, or to substitute other works for the same purpose, or to afford them the means or opportunity of carrying the earth and materials, necessary for forming the embankment, across the canal; and threaten and intend to prevent the plaintiffs from reconstructing such passage of communication, and so prevent the plain-

tiffs from making such works over the canal as they are by the act authorized to make and construct.

The bill charged that, such temporary passage of communication is a work necessary and convenient for carrying into effect the purposes of the act; and that in making the same, the plaintiffs in no respect violated the act. That the plaintiffs do not intend to make any permanent bridge over the canal, other than such as shall in all respects be conformable to the provisions and directions of the act of Parliament in that respect. That, in order to form the embankments, which must of necessity be made and completed before the railway can be carried over the canal, the plaintiffs are authorized and empowered to make such passage of communication as they did make. That the piles used, were such as were necessary for, and would have been used, in the erection of a permanent bridge. That it is expedient and necessary that the embankment should be forthwith proceeded with; but it is not practicable at this season of the year, to build such permanent bridge, without delaying and injuring the works now in progress, and which works are necessary and convenient for making the railway.

The bill prayed that the defendants, the Company of proprietors of the Grand Junction Canal, may be restrained by the injunction of this court, at all times henceforth, from interfering with, or obstructing by themselves, their agents, servants, workmen, or others, the plaintiffs, their servants, agents, workmen, and others employed by them, in making and constructing all and every, or any or either of the works necessary or convenient for constructing and making the said railway across or over the canal; and particularly, that the defendants may, in like manner, be restrained from pulling down, taking up, or destroying all or any, or either of the works, to be made by the plaintiffs, their servants or workmen, for the purpose of making, con-

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structing, or otherwise hindering or preventing, or delaying the plaintiffs, in making and constructing a passage of communication, over and across the canal at Woolverton, aforesaid, in order to construct and complete the before-mentioned embankment; and for transporting, by means of such communication, the earth and materials whereof the same embankment is to consist, over and across the canal; the plaintiffs thereby undertaking to make such passage of communication, so as to leave such clear, uniform, and uninterrupted opening, and such open and uninterrupted waterway, and such clear height above the top water of the level of the canal, as in and by the said act of Parliament in that respect, is mentioned and prescribed; and also, undertaking not to alter the line or level of the canal or towing-path, or any part thereof; nor to obstruct the navigation of the said canal, or any part thereof; nor to divert any of the waters therein, or which now supply the said canal; nor to injure any of the works of the said canal, nor in any other respect to injure or damage the said canal, or the works thereof; and undertaking further, in all respects, to perform, conform to, and obey, the enactments, clauses, provisions and restrictions in the said act of Parliament mentioned, and every of them, and every part thereof; and for further relief.

The plaintiffs moved for an injunction in the terms of the prayer of the bill.

Mr. *Pemberton* and Mr. *Bacon* in support of the motion.

Two questions arise in this case: 1st. Have the plaintiffs a right to make a temporary bridge: 2ndly. If so, have they exercised such right in a mode improper, unnecessary, or injurious to the interests of the defendants.

It is manifest that the 8th clause of the act gives to the plaintiffs the power to make such passages as they shall think necessary or convenient. Is then such power re-

strained by the 85th and 86th clauses? These clauses apply to a permanent, not to a temporary bridge. Assuming then, that the act authorizes what the plaintiffs have done, have they exercised such right improperly, capriciously, or in a manner injurious to the interests of the defendants? There is no suggestion that these works have obstructed the navigation or diverted the water; that a watercourse of thirty-three feet in width, has not been preserved, or that the boats cannot pass and repass at the spot in question: it is not proved that the driving of these piles has diverted the water, by causing any breakage in the bed of the canal,—the affidavits of the defendants merely state that the bed of the canal is porous at this particular spot.

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Sir *C. Wetherell*, and Mr. *Turner*, contra.—The act does not give to the plaintiffs a right to make this bridge, and to prevent the boats of the defendants from passing over the spot where these piles are driven. The 86th section does not mention temporary bridges; thereby shewing, that such bridges were not intended to be authorized, otherwise some restrictions would have been introduced respecting them, similar to the provisions regarding permanent bridges.

The soil of the bed of the canal is legally vested in the defendants, and the right claimed by the plaintiffs is disputed; consequently there must be a trial at law, before this court can interfere. If an injunction is to be granted, terms must be introduced restricting the plaintiffs from interfering with the bed of the canal. It is not shewn that the earth requisite for forming the embankment cannot be procured on the north side of the canal; and if it can be, this bridge is not necessary.

Mr. *Pemberton*, in reply.—1st. It is said that the plaintiffs have no legal right: 2ndly. That if they have, it must be first established by a trial at law: 3rdly. That if the

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defendants are to be restrained, the plaintiffs must reciprocally be restrained from interfering with the bed of the canal. The plaintiffs contend that the restrictions imposed as to the erection of a permanent bridge, do not prevent them from building a temporary one. The 86th clause restricts the plaintiffs from making a permanent bridge of less than given dimensions; but nowhere limits the powers given to the plaintiffs by the 8th clause, which enables them to cross any impediments in the line conceded to them by parliament: and it is acknowledged that these works are in the prescribed line.

There is no reason to send this case to a trial at law, it is a question on the construction of an act of parliament and not of disputed facts.

The plaintiffs will erect the permanent bridge as soon as the embankment is completed; it would, therefore, be idle to compel the plaintiffs to give any undertaking. The defendants have proved that no injury can result to the bed of the canal from driving the piles, for if it could, the process of pulling them up would have proved it.

MASTER OF THE ROLLS*.—Upon the facts of this case there is no dispute. The question turns entirely upon the construction of the act of Parliament. It is not disputed that what has been done by the Railway Company, has been so done, as not to interfere with the interests of the Canal Company, or with the navigation, or with those points which are matters of express reservation in the 86th clause. The Canal Company, however, say, that admitting these facts to be so, yet, under the act, the Railway Company have no authority to do what they have done, and what they propose hereafter to do. Now, that depends entirely upon the construction of the act,—and turns upon the con-

* Sir C. C. Pepys.

struction of the 8th clause, as affected by the subsequent clauses introduced for the express purpose of protecting the interests of the Canal Company.

Now, before I advert to the 8th clause, in order to see how far, independently of any restriction afterwards imposed, the Railway Company have the right they claim, I will assume for the present purpose, that the 8th clause gives the power to the Railway Company, if unrestricted, to do what they have done. The 85th, the 86th, and the 87th, are the three clauses introduced for the protection of the Grand Junction Canal Company.

The 85th clause recites that, the Railway is intended to be carried near the Grand Junction Canal, and describes the places near to which it is intended to be carried; and amongst others, Wolverton, in the county of Buckingham, the place in question; and then it provides "That nothing in the act contained shall diminish, alter, prejudice, affect, or take away, any of the rights, privileges, powers, or authorities, vested in the Company of proprietors of the Grand Junction Canal." That part of the clause has no application to the present question; it merely provides, that whatever rights and privileges the Canal Company had for carrying on their works should not be interfered with by the powers given to the Railway Company. Then it continues, "or authorize or empower the Railway Company to alter the line or level of the canal or towing-path thereto, or any part thereof, or to obstruct the navigation of the canal or any part thereof, or to divert any of the waters therein, or which now supply the canal, or to injure any of the works of the canal." Now the case on the part of the Canal Company is not put upon the ground of the Railway having done any of these prohibited acts. There is nothing in this clause to interfere with the rights given by the 8th clause; and it is not contended that the particular interests provided for by this clause have been interfered with. It is also clear, that the 86th clause

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has no such effect immediately or directly: it is not contended that the 86th clause has any reference to the work that has been commenced; and the argument for the Canal Company, assuming that it has not, insists that it refers only to the permanent bridge, and that whatever powers may be given by the 86th clause, they have no reference to a temporary bridge to cross the canal. That argument also proceeds upon the supposition, that the power to make the permanent bridge originates in the 86th clause. Now it is exactly the other way. The power to make any bridge is given in the 8th clause, and the 86th is introduced to restrict the Railway Company in the exercise of the right before given: so that they may not interfere with the rights reserved to the Canal Company as to using their canal, and it restricts the right to make the permanent bridge, so as not to alter the level of the canal, or the towing-path, or the waterway, and requires it to be a certain height above the top water-mark. These three clauses do not either directly or by necessary implication, interfere with any rights that the 8th clause gives: that is not the sort of restriction imposed by those clauses. The 85th, prohibits anything being done that shall obstruct the navigation of the canal; but, subject to that, no other restriction is imposed by the 85th clause.

The argument raised in support of the case of the Canal Company assumes this shape (and until it is examined into, it appears to have more weight than in fact belongs to it), that whereas the 86th clause protects the Canal Company as to the formation of any permanent bridge,—if the bridge in question is to be permitted, not being a permanent bridge, and therefore not within the 86th clause, there is no protection to the Canal Company as to the formation of any temporary bridge; and that the act could not intend to give unlimited authority to make a temporary bridge, because, when they give the powers for a permanent one, certain restrictions are introduced. That argument would

have a great weight, if it was not that the 85th clause is adapted to meet that danger. It prohibits all works of any description that shall have the effect of injuring the canal or obstructing the navigation. [His Honor read the 85th clause.] Nothing, therefore, of any description, can be done that would effect any one of these acts, prohibited by the 85th clause. The prohibition is more extensive in the 86th. It is not confined to the 85th clause, according to which nothing is to be done that can interfere with any of the rights reserved to the Canal Company ; but the 86th, recognising the right before given of making a permanent bridge, prescribes the manner of constructing it.

If those three clauses, introduced for the protection of the Canal Company, do not restrict any right before given, the only question that remains to be considered, is, whether the 8th clause does not give the power now claimed. It is hardly possible to conceive terms larger than in the 8th clause. It gives the persons in short, to whom the act delegates the authority to make the railway, complete dominion over the whole of the property upon the line of railway ; and, with certain restrictions introduced as to the interests protected by the subsequent clauses, which do not apply, the powers of the 8th clause are as large as can possibly be stated.

In the first place, the prior clauses authorize the making the railway in the particular line, described in the plans deposited with the clerks of the peace of the counties throughout which it passes, and amongst these is contained the particular place in question.

I inquired, whether the place in question is that at which the permanent bridge was to be made ; and it appears that, it is not only in the place where the permanent bridge is to be, but, as of course it must be, in the line prescribed by the act, and at the place where the railway is to cross the Canal Company's works, that is, to cross the canal itself. Then, having given to the Railway Company the right to

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make the railway in the line prescribed by the act, the 8th clause gives them the power in these terms:—"That for the purposes, and subject to the provisions and restrictions of this act." The purposes of the act are for making a railway and all proper works and conveniences connected therewith. [His Honor proceeded to read the remainder of the 8th clause.] Amongst the works directed by this act in a subsequent clause, is the making an embankment over the valley in question. The act, therefore, directs the Company to make an embankment over the valley in question, and to do all the works necessary or convenient for constructing, maintaining, altering, or repairing and using the railway, and other works by the act authorized. Therefore there is an end of the argument as to the possibility of getting earth from some other place. The question is—not whether the Railway Company can get it elsewhere, but—whether it is not convenient that they should get it from the place in question: they are the best judges of that; and the act makes them the judges of it. They are not to do it capriciously, but there is no question—there being high land on one side and low land on the other—that the best course is to take the land from the one side where they are to cut through, and carry it down into the valley over which they are to pass.

This then, being the authority given by the act, and there being no authority as to temporary bridges, but that the Railway Company are to do all the works necessary and convenient to carry the act into execution; what they have done, and which is admitted does not interfere with the navigation, is to throw a temporary bridge over the canal, to carry across the carriages that will convey the earth from the high to the low ground. The powers given by this act are not only what I have before stated, but they authorize as to all canals an actual interference, which may be very inconvenient to the canals. They authorize a temporary diversion of the line of the canal,—to stop the

canal and turn it in a different direction, in order that the Railway Company may complete their works.

There is here no interference with the works of this canal, and no interference with persons using it; but the Canal Company put it upon this question of right—that there is no power to pass the canal except by a permanent bridge. This, in short, is the question raised,—whether the Railway Company have a right to pass the canal otherwise than by a permanent bridge. All they desire is to pass the canal by their carts and carriages; and the passage over has been admitted not to be injurious to the canal, or to those using it. I have no doubt, on looking at the clauses of the act, that it contemplated such works. Whether the particular bridge in question was contemplated, is not material; but it meant to give the Railway Company authority to deal with property upon the whole line, so as to carry their work into execution, subject to the restrictions imposed. My opinion is that those restrictions do not apply to this work; and that the Railway Company had the right to do what they have done: and the Canal Company had no right to interfere with those works. It is said, that the Railway Company are not entitled to the interference of this Court, without a verdict at law in their favour. There is no question in dispute requiring a trial at law. It is a question of construction; and, in addition to the delay of sending the case to a jury in the first instance, their verdict would be useless; because, a jury is not the tribunal to form an opinion upon this question, where no one single fact is in dispute: it would be an idle proceeding, and one attended with great inconvenience to those carrying on this extensive undertaking, if they were ordered to suspend their works until the verdict of a jury should be obtained in their favour.

Now, the only point suggested which would make the work in question an interference with the privileges of the

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Canal Company would be,—not that there has been any diversion or wasting of the water of the canal; but—that what has been done may have a tendency to do so: with regard to that, however, it is not attempted to be shewn that it has done so, and if what has taken place did not produce that effect, it cannot be supposed that what may be done in future will do so. There has been a piercing of the bottom of the canal by the piles, and, what is a much more injurious process, taking them away again; and yet there is no evidence of any water having escaped, or of the interests of the Canal Company having been prejudiced.

I do not, however, understand, why the Railway Company have not driven their piles beyond the reach of the water; a few feet further off, at a little more expense, they might have driven them where the piles of the permanent bridge are to be placed (*a*); but unless there is some reason, which I have not heard stated, why the piles should not be driven beyond the limits of the canal, I should have thought it safer to do so, because the question if it arises again, will arise under the 85th section, which prevents them interfering with the navigation of the canal; and, although it is clear that the space they have left is larger than the space to be left by the permanent bridge, the limits in which case are prescribed, yet in the 85th section, there is no limit prescribed—it is only that the Railway Company shall not obstruct the navigation or any part of it—that is, any part of the canal, and it may be open to this question, which I am not now trying, whether they are liable to an action for damages for obstructing the water-way. I have only to decide whether they have a right to throw a temporary bridge over the canal. The breadth of water-way now left, though it may be wider than

(*a*) It was stated, by the counsel for the Railway Company, that these piles would form the foundation of the permanent bridge.

necessary for the purpose of the navigation, cannot be said not to obstruct the water-way: that question may be raised; and the Railway Company would have adopted a safer course if they had driven their piles so as to keep clear of the water;—although I do not say that such is the construction of the act.

The injunction I propose to grant, is not quite in the terms prayed, because the first part would, in fact, be totally inoperative. It is prayed, that the defendants may be restrained from interfering with or obstructing the plaintiffs, by themselves or their agents, in the making and constructing all and every, or any or either of the works necessary or convenient for constructing and making the railway. Those terms would be much too large—the effect of such an injunction could not be understood. The injunction granted, will be to meet the particular case brought before the Court: “That the defendants may be restrained from interfering with or obstructing by themselves, their agents, servants, workmen, or others, the plaintiffs, their servants, or others, in making and constructing, or causing a passage of communication, over and across the said canal at Wolverton, in the county of Buckingham, in order to construct and complete the embankment in the said bill also mentioned; and for transporting, by means of such communication, the earth and materials whereof the said embankment is to consist, over and across the said canal:”—then I have introduced the qualification in the very words of the act: “so that the forming and constructing such passage or communication, shall not obstruct the navigation of the said canal, or any part thereof, or divert any of the waters therein, or which now supply the canal, or injure any of the works of the canal.”

Those are the words in the act; and the plaintiffs propose there shall be this undertaking on their part not to do certain things, which gives to the Canal Company the benefit of an injunction:—an undertaking is equivalent to

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an injunction, and, if violated, may be the subject of an application to this Court. The effect will be, that the Railway Company are restrained by the undertaking from doing what the act prohibits, and the Canal Company are restrained, by the injunction, from interfering with the Railway Company, in doing that which, according to the construction of the act, I think they have a right to do.

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 and
 February 20th, THE NORTH MIDLAND RAILWAY COM-
 and 21st. PANY, - - - Defendants.

The 12th section of the North Midland Railway Act, empowered the Company to take land for the purposes of the act, and to enter upon lands adjoining to the Railway, and to dig and use materials, obtained therein; they, the Company, making full satisfaction for all lands to be so taken, used, or injured, and for all damages, by reason of the execution of all or any of the powers thereby granted.

The 31st section enabled proprietors, occupiers, or persons interested in such lands, to receive payment for the value thereof, and also compensation for any damage, by the severance of such lands; and for any damage, loss, or inconvenience, sustained by the taking thereof.

The 32nd section, for settling all differences to arise between the Company and the proprietors of, or persons interested in lands, which should be taken, damaged, or injuriously affected, provided for the empannelling of juries, to assess the amount of the purchase-moneys and compensation.

The 53rd section, enabled the Company, upon payment, tender or deposit, of the sums of money agreed upon, or awarded for the purchase of any lands, immediately to enter upon such lands; provided that before such payment, &c., it should not be lawful for the Company to enter upon such lands for any of the purposes of the act.

The 54th section, provided, that before taking temporary possession of any lands, the Company should agree with the owners or occupiers for an annual rent in respect thereof; and if required, should give security for payment of compensation for any permanent injury which might be sustained.

The Company having entered upon lands of the plaintiff, for the purpose of taking the sub-soil to form an embankment, he filed his bill, praying, that they might be restrained from so doing, until they should have agreed with the plaintiff for a fixed annual rent during their occupation of the land, and given security for compensation.

Held, by the Vice-Chancellor, that the acts complained of were not within the 54th section, but were, by the proviso of the 53rd section, brought within the conditions of the 12th section.

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loss or injury, as therein mentioned, to the respective proprietors of such lands, or other persons interested therein, and entitled to receive such money or compensation respectively, or (in certain events therein mentioned), upon payment of such money into the Bank of England, to the credit of the parties interested in such lands: then, and in every such case, it should be lawful for the Company immediately to enter upon such lands: and thereupon, such lands and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust and interest of all parties therein, should thenceforth be vested in and become the sole property of the Company, to and for the purposes of the act. Provided nevertheless, that before such payment, tender or deposit, it should not be lawful for the Company, or for any person acting under their authority, to bore under, dig, or cut into, or enter upon such lands, for any of the purposes of the act, save for the purposes of ascertaining and setting out the same, without the previous consent of the owners and occupiers thereof respectively. Provided always, that it should not be lawful for the Company to make such entry, after demand made of such purchase-money or compensation by the party or parties entitled thereto, and default made by the Company in payment thereof for the space of twenty-one days after such demand; unless such payment should be delayed by the acts, neglect, or default, of the party or parties entitled thereto: and, in case any person or persons should wilfully enter upon any such lands without consent of the owners or occupiers thereof, before such payment or legal tender should have been made, such person so offending should forfeit and pay any sum, not exceeding 5*l.*, for each and every day he should remain, or be on such lands.

That by section 54, after reciting, that in making and executing the railway, and the several other works by the act authorized, it might be necessary for the Company,

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their agents and workmen, to enter upon, and take temporary possession of some parts of the lands adjoining to the line of the railway and other works, for the purpose of laying, or depositing and making thereon earth, clay, stones, bricks, slates, timber, lime, and other materials; or of manufacturing such clay into bricks, or for forming temporary roads or approaches to and from the said works: and, inasmuch as a jury summoned, as directed by the act, to assess a compensation for the damage and injury done to such adjoining lands by the exercise of the powers and authorities by the act granted, could not, either upon view or from evidence, form a just opinion of the permanent injury which would be sustained by the owners or proprietors of such adjoining lands by the exercise of the powers and authorities aforesaid, until the works should have been completed; it was expedient that the Company, their agents and workmen, should be empowered to enter upon such adjoining lands for the purposes aforesaid, without having previously made such payment or investment as therein-before mentioned: it was enacted, that, notwithstanding any thing in the act contained, it should be lawful for the Company, their agents and workmen, and they were thereby empowered to enter upon the lands of any person or corporation whatsoever, adjoining or lying near to the railway and other works by the act authorized to be made and maintained, or any of them, or any part thereof respectively, for the purpose of laying, depositing, working, or manufacturing upon such lands, or upon any part thereof respectively, any earth, clay, stones, bricks, slate, timber, lime, or other materials, or for forming temporary roads, or approaches to and from the said works; and also to make use of any existing roads: they the Company, their agents and workmen, doing as little damage as might be in the exercise of the several powers thereby granted to them; and making compensation for such temporary occupation, or temporary damage of the lands, to the owners or occupiers

thereof; such compensation, in case the parties differed about the same, to be settled and recovered in manner thereinbefore provided in cases of disputes as to the value of lands through or upon which the railway and other works were intended to be made; and the compensation for any damage sustained by reason of the execution of any of the works by the act authorized: and it was thereby provided, that before entering upon any such lands, for such temporary purposes as aforesaid, the Company should, if required by the owner or occupier thereof, find two sufficient sureties, who should enter into a bond to such owner or occupier in a penalty of the amount of 50*l.* for every acre of land required for such temporary purposes, and so in proportion for any greater or less quantity, conditioned for the payment of such compensation, such sureties to be approved of by two justices of the county or borough in which such lands should be situate, in case the parties differed about the same: provided that the Company should, and they were thereby required, before entering upon any such adjoining lands for the purposes aforesaid, to agree with the owner or occupier of such lands for the payment by the Company of a certain fixed annual rent in respect thereof, during the continuance of such temporary occupation, such rent, in case the parties differed in opinion thereon, to be fixed by arbitration of two indifferent persons, one to be named by each party or by their umpire, and also to make such compensation and satisfaction to the owner of such land for the permanent damage or injury, if any, which might be done to the same by the exercise of any of the powers and authorities aforesaid, so soon as the amount of any compensation, damage, or injury could be ascertained, and, at all events, within six calendar months after the expiration of the period by the act granted for completing the railway and other works: Provided, that, before it should be lawful for the Company to make such temporary use as aforesaid of the lands adjoining or lying near the railway or works,

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the Company should, and they were thereby required to give fourteen days' notice of such their intention to the owners or occupiers of such lands, and to separate and set apart, by sufficient railings or fencings, so much of the lands as should be required to be used as aforesaid from the other lands adjoining thereto: Provided, that it should not be lawful for the Company to make such temporary use of any such lands as aforesaid, lying at a greater distance than 250 yards from the railway, nor to make bricks, or place a steam-engine upon any such lands at any place which should not be at least 250 yards from any mansion, without the leave of the owner or occupier of such mansion, in writing, first obtained for that purpose.

That the line of the railway passes through or over two meadows situate in the township of Wessington, of which the plaintiff is seised in fee-simple.

That, on the 21st of August, 1838, the plaintiff received a notice in writing, signed by one of the Directors of the Company, as follows:—[The bill set forth the notice which stated the intention of the Company, at the expiration of fourteen days therefrom, to enter and take temporary possession for the purposes of the act of the said two pieces of land]. That some time after the receipt of the notice, the plaintiff was informed by an engineer of the Company, that the said two pieces of land were not likely to be wanted. That the plaintiff had no other communication with any person acting on behalf of the Company, until the 14th of January, 1839; nor did the Company, or any person on their behalf, agree or make any offer or proposition to agree with the plaintiff, as the owner of such two pieces of land referred to in the said notice, for the payment of a fixed annual rent in respect thereof during the continuance of the temporary occupation mentioned in such notice.

That, on the said 14th day of January, the plaintiff discovered two persons, contractors with the Company for the

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completion of the railway through the township of Wessington, together with other persons, in the act of measuring and staking out part of one of the said two pieces of land. That such contractors informed the plaintiff, that they were so employed for the purpose of excavating and carrying away the sub-strata or substance of the soil under the surface of the last-mentioned piece of land, for forming an embankment on the line of the railway. That the plaintiff remonstrated against such proceedings, the Company having in no way agreed or offered to agree with him for any rent in respect of such piece of land, and such purpose of excavating and carrying away the soil not being within the provisions of the act; and he gave them notice to abstain from such proceedings, and to quit the said piece of land.

That, a few days afterwards, the plaintiff discovered several workmen and labourers employed in excavating and carrying away the under-surface soil from off the said piece of land, for the purpose of being used in the formation of the embankments in the line of the railway. That the plaintiff thereupon called upon the contractors, who informed him that they were acting under the orders of Mr. Swannick, the principal clerk or agent of the Company, who had directed them to proceed in such excavation and carrying away of the soil. [The bill then set out four letters. The first, dated the 26th of January, 1839, from Mr. Wilson, the solicitor of the plaintiff, to the said contractors, complaining of their entry upon the piece of land as contrary to the terms and provisions of the act; representing that there was no authority for taking possession thereof under the notice, even for temporary purposes, until an agreement had been made for rent, and security given, and requesting them to desist from their proceedings. The second, dated the 2nd of February, from Mr. Wilson to Mr. Swannick, to the same effect as the first letter, and calling his attention to the terms of section 54 of the act.

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The third, dated the 4th of February, from Mr. Swannick to Mr. Wilson, stating, that the entry upon the piece of land was made in conformity with the notice ; that the Company were prepared to compensate the plaintiff for the injury that might be sustained, and referring him to the agent of the Company in such matters. The fourth, dated the 6th of February, from Mr. Wilson to Mr. Swannick, to the effect generally of the first and second letters, and insisting that the Company had no power to excavate and remove the land without having first purchased the same.] That no reply has been made to such last letter, nor have the Company, nor any person on their behalf, in any way agreed with the plaintiff for a rent for the said piece of land, or the parts thereof so taken ; nor given any security to him for compensation as required by the act, although they have, by the said letters to their agent, been duly apprized that the plaintiff required the same to be given.

The bill charged, that the workmen, labourers, servants, or agents of the Company, are now in the act of digging, cutting, getting up, and carrying away, the under-surface soil from the piece of land, and have excavated therein to the depth of from five to seven feet. That the soil and earth so dug up and carried away is very valuable ; and, in fact, that the whole substance of such land will be utterly and irreparably ruined and destroyed. That the defendants are not authorized by the act in so doing, or to enter upon the land for any temporary purpose, without previously agreeing with the plaintiff as owner thereof, for a rent per acre in respect thereof.

The bill prayed, that the defendants, The North Midland Railway Company, their workmen, labourers, servants, and agents, may be restrained by the order and injunction of this Court from entering on, or in any manner working in or using the said piece or parcels of land, until they shall have agreed with the plaintiff, as such owner, as aforesaid, or the payment by the defendants of a fixed annual rent

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in respect of the said parcel of land during their temporary occupation thereof, or any part thereof, in the manner, in and by the said act in that behalf required, the plaintiff hereby offering to come into such agreement in that behalf as shall be just; and also until the said defendants shall find, as they are hereby required to do, such securities, and shall enter into such bond for payment of compensation for the part or parts of the said piece of land, to be taken for such temporary purposes as aforesaid, as in and by the said act in that behalf is mentioned and required; and that the said defendants, their workmen, labourers, servants, and agents, may also be absolutely restrained by the like order and injunction from digging up and excavating for the purposes of removing and carrying away, and from removing and carrying away from off the said piece or parcel of land the under-surface soil and earth of the said land, and for further relief.

The following clauses in the act were commented and relied on in the course of the arguments and judgment. Section 12, enacting, that for the purposes, and subject to the provisions and restrictions, of the act, the Company, their agents, and workmen, and all other persons by them authorized, are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same or of any part thereof, and to set out and appropriate for the purposes of the act, such parts thereof as they are by the act empowered to take or use, and in or upon such lands, or any lands adjoining thereto, to bore, dig, cut, embank, and sough, and to remove or lay, and also to use, work and manufacture any earth, stone, rubbish, trees, gravel or sand, or any other materials or things which may be dug or obtained therein, or otherwise in the execution of any of the powers of the act, and which may be proper or necessary for making, maintaining, altering, repairing or using the said railway and other works by this act authorized, or which

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may obstruct the making, maintaining, altering, repairing, or using the same respectively. [The section then prescribed the usual powers for making the railway.] They, the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained, in or by reason of the execution of all or any of the powers hereby granted. Section 31, enacting, that all persons and corporations by the act capacitated to sell and convey any lands, or to enfranchise lands of copyhold or customary tenure, or to release lands from rents and other incumbrances charged thereon, and the respective owners and occupiers of any lands through or upon which the said railway and other works, hereby authorized, are intended to be made, may agree to accept and receive, and may, subject to such restrictions as in this act contained as to the payment thereof, accept and receive satisfaction or recompense for the value of such lands, or of the interest therein by them conveyed, and also compensation for any damage by them sustained by reason of the severing or dividing such lands, and also for and on account of any damage, loss, or inconvenience which may be sustained by such persons and corporations by reason of the taking thereof. Section 32, after reciting that, for settling all differences which may arise between the Company and the several owners and occupiers thereof, or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted, enacting, that if any person, corporation, or trustee, so interested or entitled, and capacitated to sell, agree, convey or release as aforesaid, shall not agree with the Company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid,

or if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept such purchase-money, satisfaction, recompense, or other compensation as aforesaid, as shall be offered by the Company. [The section proceeded to detail the process for the empannelling of juries to give a verdict for such purchase-mones and compensation.]

Affidavits were filed by the plaintiff in support of a motion for an injunction in the terms of the prayer of the bill, and counter-affidavits by the defendants.

Mr. *Wigram* and Mr. *Coleridge*, for the motion, relied on the provisions of the act, and on the facts stated by the bill, and verified by the affidavits.

Mr. *K. Bruce*, Mr. *Jacob*, and Mr. *Bacon*, contra.—It must be conceded, that the 12th section of the act, if unrestrained by subsequent provisions, authorizes the Company to do what is now complained of; the question, therefore, is, whether any restrictions are imposed on the powers conferred by that section, and if so, whether the proceeding now sought to be restrained is comprised within them.

The clauses of the act up to the 32nd section relate exclusively to lands to be absolutely purchased by the Company for the construction and permanent purposes of the railway,—the 32nd section relates to the assessment of monies for such purchases, and for satisfaction, recompense, or compensation, which the 31st section had previously explained to mean compensation, satisfaction, or recompense, for and on account of any damage, loss, or inconvenience, sustained by the severing or dividing such lands to be so purchased.

Then the 53rd section says, negatively, that the Company shall not enter upon any lands which shall have been

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the subject of assessment under the terms of the 32nd section, unless upon payment or legal tender of such sums of money, as shall have been agreed upon between the parties, or awarded by a jury for the purchase of any lands, rent, or other charge, or as a compensation for any loss or injury as aforesaid. Then follows the 54th section, which provides, that the Company shall, if required by the owner or occupier of any lands, of which they may require the temporary exclusive possession, find security for making compensation for such temporary occupation, and for any damage.

The only restrictions, therefore, imposed on the powers conferred by the 12th section are these. 1st,—in the case of the purchase of the fee-simple of any lands, the payment of the purchase-monies previous to entry. 2ndly,—in the case of severance of lands, the previous payment of the compensation monies. 3rdly,—in the case of lands, the exclusive temporary possession of which is required, the previous giving security for damage to be subsequently ascertained.

The act here complained of does not fall within the terms or letter of these restrictions. The Company are, without taking exclusive possession, entering upon the lands in question in order to subtract a sufficient quantity of the sub-soil to form an embankment: they are, under the unrestricted powers of the 12th section, entering upon lands adjoining those which they are empowered to take, in order to remove and take materials for making and maintaining the railway.

Supposing, for the purposes of the argument, that what the Company are doing is a temporary taking possession within the meaning of the 54th section, the plaintiff has not given a sufficient requisition as prescribed by the section to compel the Company to find security. The plaintiff has acquiesced in what is now complained of.

of, from the 14th of January until the 14th of February, that alone is a decisive objection to granting an injunction which, independently of this objection, seeks to restrain acts already done. *Deere v. Guest* (a).

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Mr. *Wigram*, in reply.—The argument for the defendants assumes, that the act has omitted to provide for an intermediate case, where it has carefully provided for the two extreme cases. That, containing, as it is admitted to do, a clause exclusively directed to the case of the Company requiring the temporary use of lands, where such use will cause a comparatively trifling injury; and providing that security for such injury shall be given previous to exercising such right, the same act allows them such use in another case, merely stipulating that instead of a trifling, an irreparable injury should be committed. It is conceded that the Company may not deposit and leave for even a single hour, a load of bricks on the surface of any lands; but it said that they may enter, dig up, and remove, that surface to any depth they may desire.

What are the powers given by the 12th section? they are “for the purposes and subject to the provisions and restrictions of the act, to enter into and upon any lands whatever, and to set out and appropriate such parts thereof, as are by the act authorized to be taken or used; and in or upon such lands or any lands adjoining thereto, to bore, dig, cut, embank, and to remove or lay, and also to use, work, or manufacture any materials or things, which may be dug or obtained therein; the same clause subsequently saying, they the Company making full satisfaction, in manner hereinafter mentioned, for any lands which shall be taken, used, or injured, for all damages to be sustained in or by reason of the execution of all or any of the powers hereby granted;” and then the 32nd section

(a) 1 Myl. Cr. 516.

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gives directions for assessing the amount of the purchase-monies, or satisfaction, recompense, or other compensation as aforesaid. The principle of the act is clearly to give the Company no power which they shall not have previously purchased, or given security to purchase.

The notice given by the Company, stated, that they would require the temporary possession of the land; and no distinction now sought to be set up with regard to the 53rd section was ever before imagined.

With regard to acquiescence, there are two arguments invariably adduced by these Companies. If the plaintiff comes to the Court complaining of an injury at the first commencement, it is said that the damage is trifling, and the motion frivolous and vexatious; if he waits until it has assumed a graver shape, it is then said that he has acquiesced, and is therefore precluded from complaining.

Feb. 21st. VICE-CHANCELLOR.—In this case what the Company are doing is not a temporary taking possession, spoken of in the 54th section; neither are they placing themselves in the situation of intended purchasers: but what they are doing is a damage within the meaning of the 12th section, and the other subsequent sections which speak of damage as contra-distinguished from purchase. [His Honor read the 12th section.] Then with regard to the 31st section. [His Honor read it.] Now, whether that section is meant to apply exclusively to lands to be purchased, and not to lands to be used, although not purchased appears to me to be doubtful; but then comes the 32nd section. [His Honor read it.] Now the words here used would apply to purchase-monies, where the land is intended to be purchased, and also to compensation monies, for damages where the land is not intended to be purchased; and therefore, I think the section will apply to the case in question. Then, passing on to the 53rd section, a question arises, whether, upon the true construction of that section, a party

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who intends to do damage to the land, is to be allowed to enter without payment, which in the case of a purchase he is not allowed to do; and whether the case of lands to be damaged, is or not provided for by this section. [His Honor read the 53rd section.] Now, there is an inconsistency in this section; because the lands first spoken of are “any lands”—that is, any lands which might be the subject of purchase: and the words which follow are the “respective proprietors of such lands,” which cannot mean only “respective proprietors of lands to be purchased,”—the words are so very extensive;—but the terms used are “such lands”—that is, lands to be purchased, and of necessity, the term “such lands” must receive the restricted sense of lands to be purchased; then follows the proviso. Now, I consider that whatever may be the violence done to the sense in which the words are intended to be used in this section,—by the first taking them in the limited sense of lands to be purchased, and then in another sense; namely, not only lands to be purchased, but also to be damaged or injuriously affected—it would be a violent inconsistency in the act itself, if leave were given to enter into any lands to do any kind of damage, without previously making or tendering payment or compensation; and at the same time say, that where the object is to purchase, there the Company shall not enter without previous payment. If the words of the act are clearly imperative, they must, of necessity, be submitted to; but I consider the more reasonable construction is to make these words in the proviso to the 53rd section, extend not only to lands to be purchased, but to lands to be damaged or injuriously affected.

I do not find any other clause which would at all apply to the right of the Company to enter on lands which they do not intend to purchase, but still to damage, before previously paying or tendering compensation. The 12th section necessarily brings the land to be purchased within

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the operation of the 53rd section,—and the 12th section does not give a general power, but is subject to the restrictions of the act;—one of which is, that which in the 53rd section applies to land not purchased, but to be injuriously affected.

Whatever may be said as to the difficulty of putting a construction on the 53rd section, without an opinion of a court of law on the point, I think the Company cannot be permitted injuriously to affect lands, without a previous tender of payment for damages.

Then, with regard to the question of acquiescence, whether there has been such a lying by on the part of the plaintiff, as that this Court will not interfere. Now, the amount of what the plaintiff has been doing, is not a tacit renunciation of his right to interfere; but he has been going on, protesting from time to time, with a view probably to an amicable adjustment; and although the wisest course might have been, to have applied, in the first instance to Mr. Saunders, the plaintiff appears to have been more attentive to the actual damage which was being done by the contractors than to any thing else. I think there has not been that complete acquiescence which would debar him of that right which every subject possesses, namely, to the interference of this Court by injunction, to restrain the Company in what they are doing until further order.

Injunction granted.

Between HENRY DOO, - - - - Plaintiff,
 and
 THE LONDON and CROYDON RAILWAY COM-
 PANY, JOHN MOXON, FRANCIS RICARDO,
 and JOHN MATTHEY, - - - Defendants.

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March 14th,
 26th.

THE bill stated, an act of Parliament made in the 14th year of the reign of George the Third, incorporating the Company of Proprietors of the Croydon Canal, and empowering such Company, to make and keep navigable and passable for boats and other vessels, the said canal; and enacting, that all persons, whomsoever, should have free liberty to use with horses, cattle, and carriages, the road,

The plaintiff was a lessee of premises, held of the Croydon Canal Company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six

months' notice, and two years' reserved rent.

By an agreement between the promoters of a proposed Railway Company, of the first part; the Canal Company, of the second part; the plaintiff and others, as lessees of the Canal Company, of the third part; and the plaintiff and others, as owners of barges on the canal, of the fourth part, it was agreed that, in consideration of the parties of the second, third, and fourth parts, withholding their opposition to a bill in Parliament, the Railway Company should, in case they purchased from the Canal Company any hereditaments then under lease for any unexpired term of years, purchase the same without prejudice to any such lease, and the price should be ascertained accordingly.

That, in case any of the parties thereto, of the third part, should be applied to by the Railway Company to treat for any part of the premises then held under leases; or, if any of the said parties should give notice to the Railway Company of their desire to sell the premises held as aforesaid, such parties should accept, and be entitled to receive compensation, for the nature of their respective leasehold interests, and for damages sustained by them, in the execution of the act.

The plaintiff, and the other parties, withheld their opposition to the bill, which passed into an act. The Railway Company purchased, of the Canal Company, the whole of their canal and premises.

The plaintiff gave a notice to the Railway Company, requiring them to purchase his leasehold interest, and claiming compensation for damages.

The Railway Company, tendering to the plaintiff two years' reserved rent, gave a counter notice to determine the tenancy at the end of six months; at the expiration of which, they brought an ejectment. The plaintiff, obtained the common injunction on default of an answer, to restrain the Company from proceeding in the ejectment.

Held, by the Vice-Chancellor, that the Railway Company had power to determine the lease in such manner; and that the plaintiff, having had possession of the premises during the six months, in respect of which only, he would have been entitled to compensation, the injunction must be dissolved.

Held, by the Lord Chancellor, discharging his Honor's order, that by the notice given by the plaintiff, the plaintiff and the Railway Company were immediately placed in the relative situations of vendor and purchaser; and that the Company could not eject the plaintiff, until they had paid the purchase-money in respect of such interest in the premises as then belonged to the plaintiff.

Quere.—Whether the effect of the agreement, and the notice of the plaintiff, was or not to convert the determinable lease into an absolute term of years.

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ways, and passages thereof, for the purpose of conveying any timber, goods, wares, merchandize, and other things, to or from the canal, and every part thereof, without paying any thing for the use of such roads, ways, and passages; and also to navigate and pass upon, and use the canal, with any boats or vessels, and to employ the wharfs and quays for loading and unloading such goods; and also to use the towing-paths with horses and cattle, for hauling and drawing such boats and vessels, upon payment of such rates as should be demanded, not exceeding the sums therein mentioned, and subject to the rules and regulations to be from time to time made by the Company.

That, upon and after the passing of the act, the Company made, maintained, and kept the said canal navigable and passable for boats and other vessels, until the time thereafter mentioned.

That, by an indenture, dated the 23rd of October, 1824, duly made and executed, between the said Canal Company of the one part, and the plaintiff of the other part; after reciting, that by an indenture of lease, dated the 22nd of December, 1813, made between the Company of the one part, and R. Hutson, of the other part;—the piece of land thereafter described was demised to R. Hutson, his executors, administrators, or assigns, for the term of twenty-one years, then next, at the yearly rent of 8*l.*, subject to certain covenants therein contained; and reciting, that the plaintiff was then in possession of the said piece of land, and certain erections made thereon by R. Hutson, by virtue of an underlease granted to him by R. Hutson; and reciting, that the Company had agreed with the plaintiff to grant to him a reversionary lease of the premises, as thereafter expressed—it was witnessed that, in consideration of the rent, covenants, and agreements, thereafter contained on the part of the plaintiff, his executors, administrators, and assigns, the Company demised unto the plaintiff, his executors, administrators, and assigns, the premises

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therein described, to hold the same with the appurtenances, for the term of twenty-one years, from the 25th of September then next, at the rent of 31*l.* 10*s.*; and the plaintiff thereby, for himself, his heirs, executors, and administrators, covenanted with the Company, their successors, and assigns, within two years from the date of the lease, to lay out the sum of 200*l.*, in repairs of the demised premises, and in erecting buildings thereon, and generally to keep the premises, and any new buildings thereon, in good repair; and it was thereby provided, that if the Company, their successors, or assigns, should be desirous of determining that demise, at any time before the expiration of the term thereby granted; and should, by their clerk for the time being, give six calendar months' notice in writing, of such their desire to the plaintiff, his executors, administrators, or assigns, then immediately after the expiration of the notice, the term thereby granted should cease, determine, and be utterly void, to all intents and purposes whatsoever; and it was thereby declared and agreed, that if the Company, their successors, or assigns, should determine that demise in manner aforesaid, they would pay or allow to the plaintiff, his executors, administrators, or assigns, the amount of two years' reserved rent for the time being of the demised premises, and would also pay to him or them the value of his or their interest, for the then residue of the term of twenty-one years, in such of the buildings which should be then standing thereon, as they should choose to purchase; such value to be fixed by arbitration, as therein mentioned; and the plaintiff, his executors, administrators, or assigns, should be at liberty to remove and carry away such part of the erections and buildings, then standing on the premises, as the Company should not choose to purchase.

That the plaintiff carried on his trade of a coal-merchant, lighterman, and boat-owner, at the demised premises, and

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was also the owner of divers barges, which he used and employed in his trade or business.

That, after the granting of such lease, he laid out 1,100*l.* and upwards, in repairing that part of the wharf next the canal, and the embankment of the wharf; and also in the repairs of the messuage, and in the general improvement of the premises; and the same were on the 13th of May, 1835, of much greater value than the rent of 31*l.* 10*s.*, and were of the yearly value of 120*l.* and upwards; and at that time, and for many years prior thereto, the plaintiff carried on a very lucrative trade thereon, producing upon an average of three years, preceding the 13th of May, 1835, 700*l.* per annum. That some time previous to the last-mentioned day, an application was made to Parliament, on behalf of certain persons, for forming a Joint Stock Company, to be called 'The London and Croydon Railway Company,' and for a bill to empower them to make a railway; and on the said 13th of May, 1835, the said bill was pending, and in progress in the House of Commons. That by the scope and object of the bill, it was intended to destroy the Croydon Canal, and to use the greater part of the bed or soil thereof for the purpose of the railway; and also to take and use divers of the lands, messuages, wharfs, and premises, abutting upon the canal; and in particular, the premises of the plaintiff, and of a Mr. T. Hill, and others, were mentioned and particularized in the schedule to the intended act, as part of the hereditaments which would be required in making the railway.

That the plaintiff and T. Hill, together with divers other persons, whose trade or business, lands and tenements, would be affected and injured by the railway, caused notice to be given, that they would unite with the Canal Company in opposing the bill, unless provision were made thereby, for protection of their rights and interests, or a full compensation for the loss and injury which they would sustain

by the execution of the powers intended to be given by the act. That, in consequence of such intimation, several negotiations took place between the respective solicitors of the intended Company, of the Canal Company, and of the plaintiff, T. Hill, and others; for the purpose of agreeing upon certain clauses or provisions to be inserted in the act, for the protection and indemnity of the plaintiff, T. Hill, and others. That the Canal Company were desirous of assisting their tenants and lessees, in obtaining compensation for the loss which they would sustain in their respective trades and businesses, and also for the value of the respective properties held by them under the Canal Company; and the said Company's solicitors were instructed to assist in obtaining clauses and provisions for the compensation and indemnity of the tenants.

That divers clauses and provisions, intended to be inserted in the act, were drawn and prepared by the respective solicitors of the Canal Company, and of the plaintiff and others, and were submitted to the solicitors of the persons applying for the act; but such last-mentioned solicitors objected to the insertion of the clauses in the act, but consented and agreed, that the object, scope, and effect thereof, should be effected by an agreement between all the parties respectively; and it was proposed, that an agreement should be entered into accordingly, and that upon such agreement being signed by the persons then forming part of, and acting for the committee of management of the railway, all opposition to the bill should be withdrawn by the plaintiff and others. That a certain memorandum of agreement was thereupon agreed to by all the said respective solicitors, and which is as follows:—

‘ Memorandum of agreement, made the 13th of May, 1835, between the undersigned persons, members of the committee of management of the intended railway from Croydon to the London and Greenwich Railway, of the

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first part; the Company of proprietors of the Croydon Canal, of the second part; T. Hill, H. Doo, (and others), of the third part; T. Hill, H. Doo, (and others), of the fourth part. In consideration of the parties hereto of the second, third, and fourth parts, withholding their opposition to the bill now pending in Parliament, it is agreed by the Railway Committee, on behalf of themselves and the other members of the intended Railway Company, that in case the Railway Company shall purchase from the Canal Company, under the provisions of the intended act, any messuages, lands, or hereditaments, which at the time of such purchase, shall be subject to any such lease or agreement for lease, which shall have been granted to, or made with any person whomsoever, by the Canal Company, for any term of years then unexpired, the Railway Company shall make such last-mentioned purchase, subject and without prejudice to such lease or agreement, for the unexpired residue of the term of years then subsisting therein, and the price or consideration for the purchase of such last-mentioned hereditaments, shall be ascertained and paid for accordingly; and whereas, the parties hereto of the third part, are respectively lessees of divers premises, held under leases granted by the Croydon Canal Company, and use the same for the purpose of trade or business, connected with the canal; and it may happen that the said premises may be necessary to be purchased by the Railway Company, for the purposes of the act, or may be otherwise greatly deteriorated in value; and the several lessees or tenants may sustain injury or damage, in their respective trades or businesses, by reason of the execution of the act. It is therefore agreed by the Railway Committee, that in case any, or either of the lessees or tenants above-named, or their respective executors, administrators, or assigns, shall be respectively applied to by the Railway Company to treat for, sell, dispose of and convey, for the

purposes of the act, any part of the premises now respectively held under the leases by them or their under-tenants, or without being so applied to, if the said lessees, or any or, either of them, or their, or any of their executors, administrators, or assigns, shall, by notice in writing to be given to the Railway Company, signify his or their desire, to sell the whole of the premises so held as aforesaid by the party or parties giving notice,—then he or they, his or their executors, administrators, or assigns, shall and may, accept and receive, and shall be entitled to have and receive such satisfaction, recompense, and compensation, for the nature of his or their respective leasehold interests; and for any injury or damage sustained by them or him, in respect of the tenants' fixtures and improvements to the premises, so as aforesaid held by them or him respectively, or otherwise on account or by reason of the execution of the act, or in anywise relating thereto, as shall be agreed upon between them or him and the Railway Company, in manner hereinafter mentioned; and whereas, the parties hereto of the fourth part, are respectively owners of divers barges, used by them for the purpose of trading on the canal; it is hereby agreed, that the Railway Company, shall, if required by any or either of the parties hereto of the fourth part, purchase any barge or barges, belonging to them or him; and it is hereby agreed, that in case the Railway Company, and any or either of the parties hereto of the third or fourth parts, cannot or do not, within twenty-one days after the service of such notice or requisition, as aforesaid, agree as to the amount of the satisfaction, recompense, compensation, price or purchase-money, to be received by them or him, the same shall be ascertained and settled by a jury, in the same manner as any other compensation provided for by the act, is therein directed to be settled; or, if required by the Railway Company, by such arbitration as therein mentioned. Provided always, that the Railway Company, shall not be compellable to purchase

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any of such leasehold interests or barges, until the canal shall become unnavigable in some part thereof in consequence of the execution of the act; nor unless such notice as aforesaid, shall be given to the Railway Company, within twelve calendar months, from the time that such canal shall so become unnavigable; and it is hereby agreed, that the Railway Company shall not issue any warrant for the summoning a jury, to settle any difference between them and the parties hereto of the second, third, or fourth parts, without fourteen days' previous notice of their intention.'

That one part of the agreement was signed by J. Moxon, F. Ricardo, and J. Matthey, (three of the defendants) being respectively members of the committee of the intended Railway Company, and who then acted as the agents for, and on behalf of the then intended Railway Company, and had full power and authority to act for, and on behalf of the persons then forming and agreeing to form, the then intended Railway Company. That the three last-mentioned defendants were three of the persons named in the act of Parliament, for making the railway, and formed part of the Company incorporated by such act; and they were also thereby named and appointed three of the directors of the Company, and had respectively acted as such directors in the execution of the act, and still were, and acted as directors thereof, and were well acquainted with, and could give material discovery, as to the matters therein stated.

That, upon the signing of the agreement, all opposition to the bill was withdrawn and withheld on the part of the plaintiff, T. Hill, and others; and that, by an act of Parliament, made in the 5th year of the reign of William the Fourth, intituled "An Act for making a Railway from Croydon to join the London and Greenwich Railway near London:" the defendants, J. Moxon, F. Ricardo, and J. Matthey, and the several persons therein named, and other persons and corporations therein mentioned, were united into a Company, and declared to be a body corporate, by

the name and style of the “ London and Croydon Railway Company ;” and by that name were to sue and be sued. That the act contained several clauses and enactments, for empowering the Company to take lands, and to purchase the Croydon Canal ; and to treat for the value of lands ; and parties were to deliver a statement of their estates and claims as therein mentioned, and satisfaction was to be made for lands taken for the railway ; and in case parties refused or were incapable to treat, the value of land and damages, were to be settled by a jury ; and the compensation money was to be apportioned by a jury : and the act contained also, divers other clauses and enactments. That the premises demised to the plaintiff, and premises belonging to T. Hill, and other persons, parties to the said agreement, and held by them, under leases from the Croydon Canal Company, were respectively mentioned or comprised in the schedule to the Railway Act.

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That the Railway Company purchased of the Canal Company the whole of the canal, land, works, and premises belonging to the Canal Company ; and the same were by indenture, dated the 21st July, 1836, conveyed, assigned, and assured unto the Railway Company, their successors and assigns, subject to the leases granted by the Canal Company of various parts of the said premises, and amongst others subject to the lease so granted to the plaintiff for the full term of twenty-one years, from Christmas, 1834, and which lease is specified and described in the third schedule of the said indenture as follows :—

“ Lease—H. Doo. Premises—wharf. Term from Christmas, two years. Rent, 31*l.* 10*s.*”

That the Railway Company stopped the navigation of the canal on the 22nd of August, 1836. That the Railway Company afterwards adopted the agreements entered into by J. Moxon, F. Ricardo, and J. Matthey, and did in pursuance and part performance thereof purchase from the

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plaintiff all his barges which he employed on the canal. That the plaintiff on the 21st of August, 1837, gave a notice in writing to the Railway Company, pursuant to the provisions of the agreement of the 13th of May, 1835, stating that he was desirous of selling the whole of his premises upon having and receiving satisfaction, recompense, and compensation for the value of his leasehold interest therein, and in respect of the tenants, fixtures, and improvements; and thereby claiming to be entitled as satisfaction and compensation for the value of his leasehold estate and interest, and the fixtures thereon, the sum of 1,105*l.*; and for the injury and damage to be sustained in his trade or business the sum of 5,000*l.*; and also for the loss, injury, or damage to be sustained in the sale of his stock in trade, the sum of 524*l.*, which three several sums amounted together to the sum of 6,629*l.* That the Railway Company did not comply with the said notice; but they, on the 25th of September, 1837, sent to the plaintiff a notice which recited the lease of the 23rd of October, 1834, and stated that the Railway Company, as assignees of the Canal Company, were desirous of availing themselves of the proviso for determining the said demise, and giving notice of determining the same at the expiration of six calendar months from the date of the service thereof, and requiring the plaintiff to give up and quit the premises accordingly; and further stating, that the Railway Company would pay to the plaintiff the amount of two years' improved rent, and that they would not require, or take or choose to purchase, any portion of the erections or buildings then being upon the premises.

That on the 25th of January, 1835, the plaintiff caused another notice to be served at the office of the Railway Company, requiring them, pursuant to the agreement, to summon a jury to assess the amount of satisfaction, recompense, and compensation, mentioned in his former

notice, to be paid to the plaintiff; or to refer the same to arbitration; and requiring the Company to abide by and perform the agreement.

That on the 28th of May, 1838, an agent of the Company attended at the premises of the plaintiff, and produced an authority, signed by the Secretary of the Company, to receive possession, and such agent tendered to the plaintiff the sum of 63*l.*, and demanded possession of the premises, which tender and demand were declined and refused by the plaintiff. That on the 6th of July last, the plaintiff was served with a declaration in an action of ejectment in Her Majesty's Court of Queen's Bench, brought by the Railway Company to recover from the plaintiff possession of the premises.

The bill charged, that the Railway Company had adopted and acted upon the agreement, and were bound to perform the same. That the plaintiff, at the date of the agreement and the passing of the act, had an interest in the premises during the residue then unexpired of the term of years granted therein by the indenture of lease; and that having regard to the terms of the lease and of the agreement, the Railway Company were not entitled in equity to take advantage of the proviso contained in the lease, and to determine and put an end to the same upon the terms they then claimed to do, by paying to the plaintiff the sum of 63*l.* only; nor to eject the plaintiff from the premises. That the Railway Company were not, after service of the notice of the 18th of August, 1837, at liberty to exercise the power contained in the lease for determining the same. That it was customary and usual with the Canal Company to introduce into the leases granted by them a proviso to enable them to determine the same upon notice, in order to resume possession if the lessees occasioned any nuisance on the canal; but they did not intend to exercise such power unless the nuisance was committed; and if the canal had continued, the lease to the plaintiff would not have been

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determined by notice, and the plaintiff would have held and been allowed to hold the demised premises for the whole of the term granted by the lease. That under such circumstances the lease to the plaintiff ought to be valued as a term absolute, or as a lease for a term which was not likely to be determined but for the execution of the Railway Act, or, otherwise, that compensation ought to be allowed and paid to the plaintiff for the injury and damage sustained by him by reason of the determination of the lease before the expiration of the term thereby granted. That, in estimating the satisfaction, recompense, and compensation to which the plaintiff is entitled in respect of the injury and damage sustained by him, the value of his several businesses, and of the good-will thereof ought to be allowed and paid to him. That the leasehold, interest, fixtures, and improvements on the premises ought to be valued and paid for, as the same were at the date of the agreement of the 13th of May, 1835, or at least as the same were at the passing of the act.

The bill prayed that an injunction might issue to restrain the Railway Company, their officers, attornies, servants, and agents, from proceeding in the action of ejectment so commenced by the Railway Company; and from commencing or proceeding in any other action of ejectment to recover possession of the messuage, wharf, and premises, or any part thereof; and from taking any other steps or proceedings to obtain possession of the said messuage, wharf, and premises, or any part thereof; and for further relief.

The plaintiff obtained the common injunction on default of an answer.

The Railway Company and the other defendants put in their answers, and thereby stated, that they could not set forth whether the Canal Company were desirous of assisting their tenants and lessees respectively in obtaining compensation for the loss which they would sustain in their trades and businesses; but that doubts had arisen respecting the validity of the leases so granted by the Canal Company,

and that the Company were mainly, if not solely desirous of obtaining from the Railway Company, a recognition or admission of the validity of such leases, in order to protect themselves from the liability which they would incur, in case of their lessees being evicted by the Railway Company. The answers traversed generally the claims of the plaintiff, and the construction of the several agreements and documents.

The Railway Company having put in their answer, obtained the order nisi, for dissolving the injunction.

Mr. *H. Bruce*, and Mr. *Jacob*, shewed cause against dissolving the injunction, and contended, that whatever might be the power which the Canal Company had, of determining the lease granted to the plaintiff, that power was not by the conveyance of the 21st of July, 1836, transferred to their parliamentary vendees; and, even if it were, the agreement of May, 1835, required the unexpired residue of the term of twenty-one years, granted to the plaintiff, and not a mere determinable interest to be valued and purchased.

That, supposing the Railway Company to be entitled to put an end to the lease by notice, still the notice to purchase having been given by the plaintiff, while seven months remained of the lease, the Company were, at all events, bound to purchase that interest.

Mr. *Wigram*, Mr. *Richards*, and Mr. *Martin*, contra, were not called upon by the Court.

The VICE-CHANCELLOR.—It appears to me the Railway Company are right in what they are doing. [His Honor read the first part of the agreement of the 13th of May, as to the purchase of hereditaments, subject to leases, by the Railway Company, from the Canal Company.] The price

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here spoken of as requiring to be ascertained, is the price as between the intended Railway Company and the existing Canal Company. It appears to me, that the real meaning of the parties was to leave the existing leases, and the agreements for leases, precisely in the same situation as they were under the Canal Company; so that the Railway Company could only purchase the hereditaments which were subject to a lease, or an agreement for a lease, from the Canal Company, and take the reversion, to be subject in their hands, precisely to the same interests as it was subject to in the hands of the Canal Company. Then follows this particular agreement with the lessees: [His Honor read the other part of the agreement of the 13th of May]. It seems to me that there is nothing whatever in this agreement, either preventing a lessee whose lease is determinable on notice, from giving a notice to the Railway Company to purchase, or preventing the Company from availing themselves of the right to give notice to the tenant to determine the lease. Take the very case that has happened. Notice is given by the lessee to the Railway Company for compensation. The Railway Company give a counter notice to determine the lease; and supposing the question were submitted to an arbitrator or a jury, nothing more could be done than to determine the value of the interest, during the remaining portion of the six months which would have to run, and to give the sixty guineas which were to be given by the Canal Company for the two years' rent. Then, in this case, the ejectment was not brought until the expiration of the six months; so that the lessee has actually had the enjoyment of the premises, for the whole of the time for which he was to have had compensation; and all he could further have under his lease, would be the sixty guineas—and that is a matter of law with which this Court has nothing to do. In my opinion there is no ground of equity. The order for dissolving the injunction nisi, must therefore be made absolute.

The plaintiff appealed from the order of the Vice-Chancellor.

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The *Solicitor-General*, and Mr. *Jacob*, for the appeal.— This case must be governed by a principle of equity, now firmly established, which does not allow a public company, who have, through the medium of a contract, obtained an act of Parliament conferring on them certain powers, to exercise those powers contrary to the terms or spirit of their contract.

The plaintiff was possessed of a valuable lease, and although the lessors—the Canal Company, had a right to determine it, such a measure would never have been resorted to by them, except in a case of gross misconduct on the part of the lessee.

Such an understanding as to the continuance of the lease, is evinced by the stipulation as to building, entered into and since fulfilled by the plaintiff. The plaintiff had, moreover, a valuable goodwill, and even had the Canal Company determined the lease, he might have derived the benefit of this by removing to other adjacent premises, and preserving the right of trafficking on the canal, which being a public highway, the Company would have been compellable by mandamus to preserve and repair. *Rex v. Severn and Wye Railway Company (a)*.

The interest of the plaintiff would be clearly comprehended in the 36th section of the Railway Act, which provides, “ That all persons capacitated to sell and convey lands may accept and receive satisfaction or recompense, for the value of such lands, or of the interest therein; and also compensation for any damage by them sustained by reason of the execution of any of the works by the act authorized; and also for any damage, loss, or inconvenience, which might be sustained, by reason of the execution of

(a) 2 Barn. & Ald. 646.

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the powers of the act." It will be said, that the Railway Company do not obtain possession of these lands under their act of Parliament, but as assignees of the rights and interests of the original lessors; but it was only by an act of Parliament, that the one public body was enabled to take an assignment from the other; and that act was principally obtained by the assent of the plaintiff and the other lessees, given in consideration of the contract, whereby it was expressly agreed that their interests should be placed in the same condition in pecuniary value, as if the act had not passed: unless such was the intention, why was it necessary to make them parties to the agreement in two interested characters? It never could have been the intention of the lessees to place themselves in a worse situation by the agreement than they would have been under the act of Parliament.

By the effect of the notice of the 21st of August, 1837, acting on the agreement, the Railway Company were bound to buy the whole unexpired residue of the term of twenty-one years, granted by the lease of 1834. The parties were thereby placed in the situation of vendor and purchaser. *Salmon v. Randall (a)*. A vendor cannot be turned out of possession of his estate until he has received the purchase-mones; and, therefore, supposing the notice to determine the lease to be valid, both as a legal and equitable notice, the Company were, in all events, bound to purchase the seven months' interest which then remained unexpired: if relief to this extent be admitted, the right to the injunction cannot be disputed.

Mr. *Wigram*, Mr. *Richards*, and Mr. *Martin*, in support of the order of the Vice-Chancellor.—The plaintiff must establish, that the effect of the agreement of May, 1835, was to convert a tenancy, determinable in the hands of the

(a) 3 Myl. & Cr. 439.

original lessors, into an absolute undeterminable tenancy in the hands of their assignees ; or he must shew that the payment of compensation, (if any), is a condition precedent to the Company taking possession.

With respect to the first point, the answers put in clearly explain the reason for making the plaintiff, and the persons having similar interests with him, parties to the agreement. It was done in order to avoid any doubt as to the legal validity of the leases ; and there was nothing in the agreement to alter the tenancy of the lessees under the Railway Company, from that which subsisted under the Canal Company. Suppose this had been the case of a tenant for life, who had granted leases which his legal interest did not authorize, would a reversioner who had entered into an agreement of this nature, be held to have waived his right, when the reversioner came into possession to determine such leases ? Had this been the case of an onerous or unprofitable lease, in the hands of the plaintiff, would the effect of the agreement have been to prevent him determining it, supposing such a power to exist ?

Secondly : suppose a landlord stipulates that on the effluxion or sooner determination of a lease, by notice or otherwise, he will pay the tenant for crops on the ground, or for improvements, and the landlord gives a notice and determines the lease, would the tenant be allowed to retain possession and hold over the lands, until the compensation for crops or improvements was paid ?

[LORD CHANCELLOR.—This is a case of purchase, not of compensation. How can possession be taken before the purchase-money is paid ? Suppose such a lease as you have stated, and that the landlord agrees to buy his tenant's interest for 1,000*l.*, and then gives the notice to determine the tenancy, could he turn the tenant out of possession before he had paid the money ? There would be no doubt of his legal right to do so, but I conceive that this Court would restrain the exercise of it.]

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The right to hold over could not exist, if the lease had determined by effluxion of time. What is the distinction between the determination of the lease by that means or by notice?

It is material to see what are the interests which, under the agreement, the plaintiff is to be compensated for: these are "leasehold interest, tenants' fixtures, and improvements or otherwise, on account of the execution of the act, or in anywise relating thereto;" the latter words must be construed to be controlled by the preceding specified matters, which clearly do not extend to goodwill or loss of trade: out of the sum of 6,629*l.*, the plaintiff claims 5,524*l.* or five-sixths in respect of the goodwill. *Rex v. The London Dock Company (a)*.

The *Solicitor-General* was not required to reply.

THE LORD CHANCELLOR.—In this case there are some points which involve questions of nicety, but into which it is not necessary now to enter. I will, therefore, for the present, assume that this agreement does not destroy a legal right of the Railway Company to determine the lease in the same way as the Canal Company might have done; and deal with the question whether there are equitable grounds which will protect the tenant.

The plaintiff had taken a lease under the Croydon Canal Company, containing a proviso enabling that Company to determine such lease by giving the usual six months' notice. An act of Parliament passes, by the authority of which, the Railway Company purchase the entire site of the canal, and all the interest of the Canal Company; and thereby come into the place of the Canal Company, as regards those persons who were holders of leases under the latter Company. It can hardly be supposed, considering the extensive rights existing in the number of persons

(a) 5 Adol. & El. 163.

holding wharfs on the banks of this canal, that the legislature would have passed this act without securing some compensation or protection to those rights. The Railway Company, therefore, purchase the neutrality of those persons by means of an agreement, and, having entered into this agreement, they then give a notice to determine the lease in question, and, the time having expired, they bring an action of ejectment; and, as a matter of course, obtain a judgment to recover possession of the property.

The agreement into which the Company entered, expresses that as the price of their neutrality,—as the condition upon which the lessees are to abstain from opposing the bill then in Parliament, that—[His Lordship read the terms of the agreement of the 13th of May, 1835].

I pass over the question I have before adverted to, which may be determined when this cause shall be in a proper state for discussing it; and I proceed to consider the effect of the agreement in other respects. The agreement is between the Railway Company of the first part; the Canal Company of the second part; the plaintiff and others of the third, and also of the fourth parts. It recites that the parties thereto, of the third part, are lessees under the Canal Company, and prescribes notice to be given by such of them as shall be desirous of selling the premises so under lease. Within the limited time a notice was given by the plaintiff, whose leasehold interest was at that time one for a number of years, and, I assume for the present purpose, was liable to the power to determine. The moment that notice was given, the relative situation of vendor and purchaser commenced. The plaintiff had a right to say to the Company, ‘you have contracted to purchase;’ and the Railway Company were obliged to pay for the value of the then existing leasehold interest, and for compensation. I give no opinion as to whether the price demanded by the plaintiff was extravagant or not. I proceed on the ground that the parties stood in the situation of vendor and purchaser. The tenants or lessees had

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abstained from opposing the act, relying on the agreement; and the Railway Company having contracted to purchase their interests, give them notice, to determine what they had so agreed to purchase. This they would be enabled to do at law, even if in violation of good faith, but fortunately the lessees have protected themselves in equity. Can it be supposed, that the lessees intended to leave themselves no protection against a legal notice to quit the premises? Why did they enter into any agreement at all if it was the intention of the parties that the Railway Company should avail themselves of their strict legal powers? If then the situation of the parties be those of vendor and purchaser, the Court will not allow the one party to turn the other out of possession of the subject of contract, until the purchase-money has been paid. If what the one party has contracted to purchase be an absolute term, the price or value may easily be estimated:—if a determinable one, still there is an interest, such as existed at the time of the notice to purchase, to be ascertained. What the Railway Company are now seeking to do, is to repudiate the contract into which they have entered, and to obtain under their legal powers, an interest, which they have agreed to obtain only by purchase.

In every part of the agreement the Railway Company are treated as intended purchasers: expressions shewing this are repeatedly used; and I am of opinion, that, by virtue of the notice, they were placed in the intended situation of purchasers. What is the exact interest which they are bound to purchase, remains to be decided; but to enable the Company to obtain possession before this has been ascertained, would be, in my view of this case, sanctioning a violation of good faith against the lessee. I have no hesitation in saying, that the plaintiff is entitled to an injunction, until either the progress of this suit or some private arrangement shall have ascertained what such amount is to be.

Between CHARLES HYDE, - - - - Plaintiff,
 and
 THE GREAT WESTERN RAILWAY COM-
 PANY, - - - - Defendants.

1839.

April 29th,
 May 1st.

THE bill stated, that the plaintiff was previously to the date of the agreement hereinafter mentioned, and still is seised or otherwise well entitled to him and his heirs for an estate of inheritance, in fee-simple, in possession of certain pieces or parcels of land. That the body or corporation known by the name and style of The Great Western Railway Company, have required for the purposes of the act incorporating the said Company, certain portions of the said pieces or parcels of land. That the plaintiff employed and appointed R. Lumbert, as his agent, to treat with the Company respecting the sale of the land required by them; and, on the 6th of April, 1839, D. Lousley, acting for and on behalf of the Company, and the said R. Lumbert, acting for and on behalf of the plaintiff, severally signed an agreement respecting the purchase of the said land, as follows:—

“ Memorandum of an agreement made the 6th April, 1839: D. Lousley, on behalf of the Company, agrees to give and pay the sum of 1,000*l.* for the purchase of the freehold and inheritance in fee simple of and in all that, (parcels described), and R. Lumbert, agent for C. Hyde, Esq., owner of the fee of the above premises, agrees to accept the said sum of 1,000*l.* on the terms above mentioned; and the Company, by the said D. Lousley, agree further to pay the sum of 8*l.* 8*s.* to the surveyor of the vendor for his charges, the said sum to be paid without

The 39th section of the Great Western Railway Act provides for the payment into the Court of Exchequer of the money agreed or awarded to be paid, for the purchase of lands to which a title shall not be made out to the satisfaction of the Company.

The 42nd section provides, that upon payment, tender, or deposit of such purchase money, the Company shall be entitled to enter upon such lands.

The Company entered into an agreement with a landholder for the purchase of lands on the line of the railway, and before acceptance of title, or payment, tender, or deposit of the purchase money, entered upon the land.

Held, by the Vice-Chancellor, that such entry was illegal. But, *Held* by the Vice-Chancellor, and by the Lord Chancellor affirming his Honor's decision, that this was not a case within the act; that on payment of the purchase-money into the Court in which the bill was filed, the Company were entitled to enter; and that an injunction, which had been obtained *ex parte*, should thereupon be dissolved.

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account, and whatever the amount of such costs, charges, and expenses may be. The land tax upon the above property is not redeemed, but shall be redeemed forthwith by the vendor at his own expense. The above 1,000*l.* is understood to be 100*l.* per acre for the land, and the residue for the severance and other damage, and further, that C. Hyde shall satisfy all the demands of his tenant. In case additional land should be required by the Company, the same to be taken and paid for after the same rate per acre as above stated."

That since the execution of the memorandum of agreement, the Company have, without the consent or knowledge of the plaintiff, or of R. Lumbert, and without having paid to or on account or behalf of the plaintiff the sum of 1,000*l.*, and without having paid the sum of 1,000*l.* into the Bank of England in the manner for that purpose provided by the act of Parliament, entered into the possession of the land so required by the Company as aforesaid, and have commenced various works, excavations, and embankments, with a view to the making and for the purposes of the railway, and have in various other ways used, occupied, and dealt with the said hereditaments.

The bill prayed, that the Great Western Railway Company might be decreed to pay to the plaintiff the sum of 1,000*l.* by a short day to be named for that purpose, the plaintiff being ready, and offering to do and execute all such acts and assurances as should be proper and necessary for conveying and assuring the said piece of land so agreed to be purchased by the Company, and otherwise to perform the agreement on his part; and that the Company, their agents, servants, and workmen, might in the meantime, and until the Company should have paid the purchase-money, be restrained by injunction from digging, cutting through, or excavating the said piece of land, or any part thereof, and from continuing or proceeding with any works done or

occasioned by the Company in, over, upon, or through the said land, and from doing or committing any act to the injury, damage, spoil, or destruction of the said land, or any part thereof, and for further relief.

The two following are the only clauses of the act material to the question :—

Section 39, enacting, that in case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this act, or for any interest, or for compensation as aforesaid, shall refuse or neglect to accept the same, or to convey the premises or interest in the premises purchased, or shall refuse, neglect, or be unable to make a title to such premises, or to such interest in the premises, to the satisfaction of the said Company, then and in every such case it shall be lawful for the said Company to order the money so agreed or awarded as aforesaid to be paid into the Bank of England in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account to the credit of the parties interested in the said lands.

Section 42, enacting, that upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury for the purchase of any lands, rent, or other charge, or as a compensation for any loss or injury as aforesaid to the respective proprietors of such lands or other persons respectively interested therein, and entitled to receive such money or compensation respectively within three calendar months after the same shall have been so agreed upon or awarded; or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands to the satisfaction of the said Company; or if any party entitled unto or to convey such lands shall not be known, or

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shall be absent from England, or shall refuse, neglect, or be unable to convey the same, upon payment of such money into the Bank of England as hereinbefore directed, then and in every of such cases it shall be lawful for the said Company immediately to enter upon such lands, and thereupon such lands, and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the said Company to and for the purposes of this act: Provided nevertheless that before such payment, tender, or deposit in the Bank of England as aforesaid, it shall not be lawful for the said Company, or for any person acting under their authority, to bore under, dig, or cut into, or enter upon such lands for any of the purposes of this act, save for the purposes of ascertaining and setting out the same for the purposes of this act, without the previous consent of the owners and occupiers thereof respectively.

The plaintiff obtained an *ex parte* injunction in the terms of the prayer of the bill, and the Company gave notice of a motion to dissolve the injunction.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stevens*, in support of the motion.—The plaintiff has filed a bill in this Court for a specific performance of the agreement entered into by him with the Railway Company, and there can be nothing in dispute except as to the security of the purchase-money, because the present is not a case where the purchase may go off owing to a defect of title, and where the purchaser is exercising an act of ownership on land, which ultimately may be thrown back on the vendor. The land in question is within the line of the railway, and the Company differ from an ordinary vendor in this important particular, that, with regard to land in their line, they must take it, and they are bound to pay for it.

The only provisions as to bringing the purchase-money

for lands taken by the Company into the Exchequer, are, when the Company have a contract with a person who is clearly proved to be the owner of the land, or when the land has been valued by the jury process; because, in both of these cases, all possible interests in the land are bound. But where, as in this case, there is an agreement with a person, who, although in possession, may not be the owner, (for that is uncertain until a title is made out), the money cannot be paid into the Exchequer until all uncertainty is cleared up. The plaintiff has filed his bill in this Court, and the Company are willing to pay the purchase-money into this Court. An abstract of the plaintiff's title was applied for two days before the injunction was obtained, and no answer has been returned to that application.

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Mr. *Richards* and Mr. *Renshaw*, contra.—The Company have agreed to purchase this land, and have entered into possession. That is an acceptance of the title; independently of which, they have admitted by the language of the agreement itself that the plaintiff is the owner of the inheritance. The 42nd section shews that the Company have no right to enter on any lands until they have paid or tendered the purchase-money: if they had done so, their entry might have been legal. If they were dissatisfied with the title, they might have paid the money into the Exchequer. Without doing either they have illegally entered upon the land.

Mr. *Knight Bruce* was not required to reply.

The VICE-CHANCELLOR.—It appears to me that the sole question is, which Court the money shall be paid into? If the money had been paid into the Court of Exchequer, I apprehend the vendor would not have taken it out until he had made out the fact that he was entitled. In that case the interim possession by the Company would be clearly lawful according to the terms of the act of Parliament;

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because, as I understand the 39th section, it would be a case in which the Company might pay the money into the Exchequer; and the prohibitory clause is, that before the payment or "deposit in the Bank of England as aforesaid," it shall not be lawful for the Company to enter; thereby implying that it would be lawful for them to enter, provided they paid the money into the Exchequer, supposing that to be the only part of the act that relates to it.

It seems to me, strictly speaking, the act of the Company which is complained of was not legal. Then the vendor files his bill, not in the Exchequer, but in this Court, and on the apparent illegality of the act the Court granted an injunction; and the question is, what is to be done with that injunction? I cannot but think the money is as safe in this Court as in the Court of Exchequer; and the bill being filed in this Court by the vendor, it is more convenient for all purposes of justice that the money should be in this Court. I therefore think, that if the Company pay the 1,000*l.* into this Court, the injunction should be dissolved.

The money was paid in, and the order dissolving the injunction drawn up.

The plaintiff moved before the Lord Chancellor to discharge the last-mentioned order.

Mr. *Richards* and Mr. *Renshaw* for the motion, contended—That the Company by entering on the land had waived all objections to the title; and that the payment of the money ought to be made to the plaintiff and not into the Court.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Stevens*, for the Company, were not called upon to address the Court.

May 1st.

THE LORD CHANCELLOR.—This is not a case under the act, but a case of specific performance. The Company have here taken possession as purchasers, and the whole

question is, whether they have or not accepted the title. The ordinary course is to direct, either that the purchase-money be paid into Court, or that the possession be given up. The vendor by filing this bill has elected his Court: and in a case of specific performance he can require nothing more than that the purchase-money should be secured. If the acts of the Company amount to an acceptance of the title, the vendor has a very short remedy: as soon as a conveyance is tendered he may apply for the purchase-money. If there were any reasonable ground for apprehending that the vendor might not get his purchase-money, this Court would interfere; but it appears that this land is in the direct line of the railway, and that the Company would be sufferers by not obtaining it. The motion must be refused with costs.

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BETWEEN HER MAJESTY'S ATTORNEY-GENERAL, at the Relation of G. MITFORD, W. H. HALL, J. W. WILLATS, and C. HAWTHORNE, - - - - - Informant,
and

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Dec. 8th, 10th.

THE LONDON and SOUTHAMPTON RAILWAY COMPANY, - - - - - Defendants.

THE information stated, that by an act of Parliament, made in the fourth and fifth years of the reign of William the Fourth, intituled "An Act for making a railway from

The London and Southampton Railway Acts direct, that where any bridge shall be

erected for the purpose of carrying any turnpike road over or across the railway, the ascent to such bridge shall not be more than one foot in thirty feet, except where the "present inclination" of such turnpike road shall be steeper, in which case the inclination of such road shall not be steeper than the present inclination of such road.

Held, by the Vice-Chancellor, that the expression "present inclination" is to be referred to the inclination of a road at the time when taken by the Company.

That the exception applies as well to a bridge built on a new or diverted road made by the Company, as to a bridge built on the site of a previously existing turnpike road.

That the relative steepness of a new or diverted road and of an old road is to be determined, not by their comparative acclivity, measuring the whole length of each from the commencement to the end of the deviation,—but by a comparison of the rate of ascent on the new road, from the place of diversion below the bridge to the crown of the arch of such bridge, with the rate of ascent on the old road, from the same place to the point on the old road at which, if the two roads had been parallel, the same distance would be attained.

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London to Southampton," it was enacted that certain persons therein named, and all other persons and corporations therein mentioned, should be a body corporate by the name and style of "The London and Southampton Railway Company," and by that name might sue and be sued. And it was by the 9th section of the act enacted, that for the purposes, and subject to the provisions and restrictions of the act, it should be lawful for the Company, their deputies, engineers, contractors, servants, agents, and workmen, and other persons, by them authorized to construct or make, in, upon, across, under, or over the railway, or other works, and in, upon, across, under, or over any lands, streets, hills, valleys, roads, rivers, canals, brooks, streams, or other waters whatsoever, such inclined planes, tunnels, embankments, bridges, arches, piers, roads, ways, passages, conduits, drains, culverts, cuttings, and fences; and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing places, engines, and other buildings, machinery, and apparatus, and other works and conveniences, as the Company should think proper; and also to divert or alter the course of any rivers, canals, brooks, streams, or water-courses, during such time as might be necessary for constructing tunnels, bridges, or passages, under or over the same; and also to divert or alter the course of any roads or ways, or to raise or sink any roads or ways, in order the more conveniently to carry the same under or over the railway; and also from time to time to alter, repair, or discontinue the before-mentioned works, or any of them, and to substitute others in their stead, and to do and execute all other matters and things necessary for making, maintaining, altering, or repairing and using the railway and other works by the act authorized, the Company, their deputies, contractors, agents, servants, and workmen, doing as little damage as might be in the execution of the several powers to them thereby granted, and making satisfaction in manner in the act mentioned to all

persons and corporations interested in any lands which should be taken, used, or injured, for all damage to be by them respectively sustained, in or by the execution of all or any of the powers thereby granted. And it was by the 72nd section further enacted, that, in all cases where the railway should cross any turnpike road, such turnpike road should be raised or sunk by and at the expense of the Company; so as that the same should pass over the railway, or that the railway should pass over the turnpike road by means of a bridge of such height and width, and with such an ascent or descent as were by the act in that behalf provided: and it was by the 75th section enacted, that when any bridge should be erected for carrying any turnpike road or public highway over the railway, the road over such bridge should be formed—and should at all times be continued—of such width as to have a clear and open space between the fences of such road of not less than fifteen feet; and the ascent to such bridge for the purposes of such road should not be more than one foot in thirty feet; and, in the case of any other public highway, not more than one foot in thirteen feet; and a good and sufficient fence should be made on each side of every such bridge, which fence should not be less than four feet above the surface of such bridge: and it was by the 77th section further enacted, that in all cases in which, in the exercise of any of the powers thereby granted, any part of any of the carriage or horse roads, either public or private, should be found necessary to be cut through, diverted, raised, sunk, taken, or so much injured, as to be impassable for passengers or carriages, or by the persons entitled to the use thereof, the Company should at their own expense, and before any road should be so cut through, diverted, raised, sunk, taken, or injured as aforesaid, cause a sufficient carriage or horse road (as the case might require), to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, diverted, raised, sunken, taken, or injured, as

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aforesaid, or as near thereto as might be; and should cause the same to be put into good and substantial order and condition, where the former road could not more easily be restored; and, where the road cut through, diverted, raised, sunken, taken, or injured, should be a turnpike-road, the substituted road, if temporary, should be set out and made as aforesaid; and the principal road should be restored within six calendar months next after the commencement of the operation; and the railway, where it should cross such turnpike road, should be constructed and kept in repair in such manner as to prevent, so far as might be practicable, any obstruction to the passage along such turnpike road.

[The information then stated another act, made in the first year of the reign of her present Majesty, whereby the Company were empowered to make certain alterations in the line of the railway, but which alterations did not include the turnpike road hereinafter mentioned.]

That, by an act of Parliament made in the second year of the reign of George the Fourth, intituled “An Act for more effectually making, repairing and improving a certain road from Reading, in the county of Berks, to Basingstoke, in the county of Southampton,” certain persons and their successors, to be elected in manner therein mentioned, were appointed trustees for putting the said last-mentioned act into execution. That the said last-mentioned road existed for many years previous to and at the time of passing the said first-mentioned act; and that the trustees thereof are so numerous that it is impossible to make them parties to this information.

That, previous to passing the first-mentioned act, the persons who had subscribed together for the purpose of making the railway,—and who were afterwards incorporated by the same act,—in pursuance of the standing orders of the House of Commons relating to railways, in the month of September, 1834, deposited with the clerks of the peace for the respective counties of Surrey and Southampton, a map or plan and section of the said then intended railway,

whereby the same was represented as passing or crossing the Basingstoke and Reading turnpike road, at or near a place called Totterdown Hill, in the parish of Basingstoke; and by such section it was represented that the railway would pass under the road, at the point of intersection of the said road and railway.

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That application was made on behalf of the said subscribers to the trustees of the road, for their assent to the railway being made in the manner and in the direction last stated; and a meeting of the trustees having been held on the 7th of January, 1834, to consider of such application, a person, purporting to be an agent of, and employed by, the said subscribers, attended thereat, and exhibited to the trustees, then present, a map or plan corresponding with the map or plan so deposited with the clerks of the peace as aforesaid; and also a drawing representing the vertical appearance or section of the railway, by which it appeared, that the railway was to pass under the road at the said point of crossing by means of an archway, without disturbing or altering the level of the road. That the trustees came to an unanimous resolution, which was duly entered in their books and signed by the chairman of the said meeting, as follows:—

“Ordered, that this meeting do assent to the act for erecting such railway, provided that the level of the road be not altered, and that the crown of the arch be at the depth of two feet at the least below the same.”

That such resolution was communicated to the said agent of the Railway Company, and he then stated and undertook on behalf of the Company, that the level of the road should not be altered; and that the crown of the arch over the railway should be at the depth of two feet below the level of the road where such crossing was to take place. That, upon the faith of such representation, the trustees abstained from opposing the subscribers in their application to Parliament, as they would otherwise have done.

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That, in the month of July, 1838, the Company were carrying on the works of the railway near to the road, and were approaching the point at which it is intended that the railway shall pass under the road; and it then became apparent, and it is the fact, that it was and is the intention of the Company to carry the railway under an arch or bridge, and to divert the turnpike road from its present line and course, and to substitute another road for the road so to be diverted, and to carry such substituted road over such arch or bridge; and that the trustees having inspected the road, and conceiving from the then state of the works, that it was the intention of the Company to depart from the condition on which the trustees had assented to the formation of the railway, they directed Mr. E. Vines, their agent, on their behalf, to apply to the Company for an explanation of the manner in which it was intended by them that the railway should cross the road.

[The information then stated several communications verbally and by letters, which took place in July, 1838, between the trustees and Mr. Vines on their behalf, and the Railway Company, through Mr. A. Martin and Mr. Dodd, their engineers; the result of which was, that the trustees acquiesced in the plan suggested by the Company with respect to the road and bridge, but, as it was stated, in the full understanding and upon the faith of Mr. Martin's undertaking and representation that the road, when deviated, would not be carried over the arch or bridge at a greater elevation than one foot in thirty-three feet.]

That, at the time when the last-mentioned communication took place, the arch or bridge was not built; and neither the trustees nor their surveyor did or could know what was intended to be the height of the arch or bridge over which the road was intended to be diverted. That the Railway Company having proceeded further in their works, and having marked out by stakes the point at which they intended to divert the turnpike road, and to substitute another

road and to carry the substituted road over the arch or bridge, and having also proceeded to erect the arch or bridge, the surveyor of the trustees perceived that the same was being constructed so as to render the road impassable.

The information charged, that it was impossible to carry the road, as staked out and as the works were proceeding, over the arch or bridge without making the ascent to the arch or bridge for the purposes of the road more than one foot in thirty feet,—and the surveyor having, on the 12th of October, 1838, reported such fact to the trustees, Mr. Vines, by their direction, wrote to Mr. Martin on the subject.

[The information then stated certain other communications by letter and otherwise, in October, 1838, between Mr. Vines and Mr. A. Martin, wherein Mr. Vines complained that the road and bridge were being raised far beyond the height assented to by the trustees; and Mr. Martin, on the other hand, insisted that the works were proceeding in conformity with his agreement and the assent. It also stated a formal notice, dated the 25th of October, 1838, served on the part of the trustees upon the Company and their officers, not to interfere with the turnpike road until another road was made instead thereof, in conformity with the act and the agreement.]

That, notwithstanding such notices and letters, and since the same were respectively served and sent, the Company have continued and are still continuing to carry on their works in manner aforesaid, and to make and form the road, which it is intended by them to divert and carry over the arch or bridge, in such a manner as that the ascent to the arch or bridge for the purpose of such road will be more than one foot in thirty feet. That the part of the road so intended to be diverted by the Company is situated upon, and forms a steep ascent, and is part of the direct road from Reading to Basingstoke; and there is at all times during the day and night, and constantly, great traffic thereupon by coaches, waggons, and other vehicles,

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and persons on horseback, passing and repassing; and great quantities of chalk are carried along such road; and the carriages whereby such chalk is conveyed are in general very heavily laden, and it will greatly injure and prejudice all her Majesty's subjects passing on the road if the same is made steeper than it now is. That the Company threaten, and intend, to divert and carry the road over the arch or bridge so as to make the ascent thereto more than one foot in thirty feet; and they have marked out, and begun to form a new road, which they intend permanently to substitute for the existing road, and to carry the same, when substituted, over the arch or bridge in manner aforesaid: and they threaten, and intend as soon as such substituted road shall be made and formed, to take under the powers of their acts the existing road, and to cross or cut through the same, and thereon to form the railway. That the trustees have not authorized and agreed to such diversion of the road; and the only authority ever given to the Company by the trustees, and the only agreement between them, were such as hereinbefore mentioned: and, even if the trustees had so agreed, yet the Company are not authorized to make the ascent to the bridge more than one foot in thirty feet.

That, having regard to the manner in which the road has been marked out, and is intended to be diverted as aforesaid; and, having regard to the height of the arch or bridge as the same has been built by the Company, if the ascent to such bridge for the purposes of such road shall not be more than one foot in thirty feet, the space between the top of such arch or bridge and the surface of the road will not be sufficient for the support of the road; but the same will be dangerous and unsafe, and the weight of the carriages and other vehicles, passing over the same, will be such as to endanger the lives of the persons passing over the arch or bridge; and the same cannot safely be used for carriages laden with lime, chalk, and other heavy articles.

The information prayed, that the Company, their ser-

vants, agents, and workmen, might be restrained by the decree of this Court, and might, in the interim, be restrained by the order or injunction of this Court, from in any manner taking, diverting, cutting through, injuring, or interfering with, the Reading and Basingstoke Turnpike Road, until they should have made, instead thereof, a sufficient carriage road, as convenient for passengers and carriages as the said road then was; and so that the ascent to the bridge or arch, by which the railway should be made to pass under the road, so to be made and substituted, should not be more than one foot in thirty feet: and also from diverting or carrying the intended road, or any other road over the arch or bridge, so as to make the ascent to the said arch or bridge, for the purposes of the road, more than one foot in thirty feet; and from doing or causing to be done, any act or thing, whereby the existing Reading and Basingstoke Turnpike Road, or any road to be substituted for the same, should or might be obstructed, impeded, or rendered less secure or safe, than the same then was, and had been previously thereto, for carriages and passengers; or by which carriages or passengers should be hindered or prevented from passing and re-passing in the same manner as they had theretofore been able to pass and repass; and for further relief.

By the 45th section of the act of the first year of the reign of her present Majesty (not stated in the information), the provisions contained in the clauses before stated, regulating the rates of ascent and descent over and under bridges, by which turnpike and other roads might be made to cross the railway, were repealed, and it was by such section enacted "that where any bridge shall be erected for the purpose of carrying the said railway over or across any turnpike road, public highway, or occupation road, the descent under such bridge shall not, in case of a turnpike road, exceed one foot in thirty feet, and, in case of any other public highway, shall not exceed one foot in twenty feet; and in case of any such

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occupation road, shall not exceed one foot in thirteen feet; and that where any bridge shall be erected for the purpose of carrying any turnpike road, public highway, or occupation road, over or across the said railway, the ascent of such bridge for the purpose of any turnpike road, shall not be more than one foot in thirty feet; and for the purpose of any other public highway, shall not be more than one foot in twenty feet; and for the purpose of any occupation road, not more than one foot in thirteen feet; except where the present inclination of such turnpike road, public highway, or occupation road, respectively, shall be steeper than one foot in thirty feet, one foot in twenty feet, and one foot in thirteen feet, respectively; in all which cases the inclination of such roads, in passing the same over or under the said railway, shall in no case be made steeper than the present inclination of such road, respectively, without the previous consent in writing of the trustees, surveyors, or owners respectively of the said roads.

Notice was given of a motion for an injunction, in the terms of the prayer of the information.

Affidavits were filed in support of, and in opposition to the motion: on the part of the informants, verifying the statements of the bill; and on the part of the Company, first,—denying the agreements as alleged in the information; secondly,—to shew that it was impossible to avoid, in some measure, raising the turnpike road, in order that the railway might pass beneath; and thirdly,—that the manner in which the Company were proceeding to construct their works would be most beneficial to the public using the turnpike road, or would, at least, afford a degree of convenience equal to that of the old road. On this point, the following affidavits were read on the part of the Company:—

A. Martin, G. Hewitt, and T. Dodd, deposed, that the level of the summit of the hill in question, situate above the intended point of diversion, and to reach which, every load passing from Basingstoke along the turnpike road

toward Reading must pass, either as the same then existed or should be thereafter diverted, was thirty-five feet higher than the level of the ground at which the intended diversion was proposed to commence on the Basingstoke side of the railway; and twenty-five feet higher than the crown of the arch of the bridge: that, in passing over or along the diverted line of road from Basingstoke to the summit of the hill, the passenger does not, at any time, lose any ascent which he has made.

A. Martin deposed, that the fact was, and J. Macneill deposed that it appeared by the sections which had been taken, that the intended diverted road was about twenty-eight feet longer than the old road, between the same points. A. Martin deposed, that the bridge was constituted at an angle of forty-five degrees to the line of the railway—that the span thereof was thirty feet on the square; that the arch was semi-elliptic, with a rise of nine feet six inches, and two and a half bricks thick; and that he had so informed J. Macneill.

J. Macneill deposed, that the general or average rate of acclivity over the diverted line would be less steep, or more favorable, than over the old road: that taking a given distance, say, one hundred feet, on each side of the bridge on the intended diversion, and of the proposed crossing of the railway on the old road, he found that the rates of acclivity were better on the proposed road than on the old road; and that the rate of acclivity from the bridge to the Reading end of the diversion was, in fact, considerably flatter on the diverted line than on the old line of road. [The affidavit then entered into and detailed several minute calculations, from which the deponent inferred, that the draught would be less severe on the proposed than on the old road; that the actual expense of the difference in draught on the two lines of road would be too slight to be detected, and was inappreciable.]

In support of the information several affidavits were filed

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in reply, exhibiting different results with respect to the abruptness of the acclivity, and the convenience which the proposed works were calculated to afford.

F. Giles deposed, that it was impossible to carry the turnpike road over the arch, in the way proposed by the Company, so as to maintain the present inclination of the road: that, if the same had been carried over the railway by means of an iron top, instead of a brick arch, the present inclination might have been maintained.

J. B. Clacy deposed, that he had measured and taken the levels of the Reading and Basingstoke turnpike road, for a distance of three hundred feet, commencing at that distance from, and proceeding towards the point at which the railway was intended to cross and intersect the road, and that such road forms ascents as follows:—for the first one hundred feet, an ascent of one foot in thirty-one feet seven inches; for the second one hundred feet, an ascent of one foot in twenty-nine feet three inches; and for the third one hundred feet, an ascent of one foot in twenty-six feet one inch. That the road then forming by the Company, being measured at the like distance of three hundred feet from and proceeding towards the summit of the arch or bridge, over which it was intended to convey the last-mentioned road, would form a series of ascents as follows:—for the first one hundred feet, calculating the arch or bridge to be covered with three inches of concrete and six of gravel, an ascent of one foot in twenty-two feet eight inches; and, calculating the arch or bridge to be covered with three inches of concrete and twelve of gravel, an ascent of one foot in twenty-one feet eight inches; for the second one hundred feet, calculating the arch or bridge to be covered with three inches of concrete and six of gravel, an ascent of one foot in twenty-one feet eight inches; and, calculating the arch or bridge to be covered with three inches of concrete and twelve of gravel, an ascent of one foot in twenty-one feet eight inches: for the third one hun-

dred feet, calculating the arch or bridge to be covered with three inches of concrete and six of gravel, an ascent of one foot in twenty-five feet six inches; and, calculating the arch or bridge to be covered with three inches of concrete and twelve of gravel, an ascent of one foot in twenty-four feet six inches.

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W. Winkworth and J. B. Clacy deposed, that the road forming by the Company was, and would be if completed, much steeper than the present inclination of the road at and to the point of intersection; and that, in the judgment and belief of deponents, it was impossible for the Company to make and complete such road as convenient for passengers and carriages as the turnpike road was at and from the place where it was intended to divert the same; and more especially by reason of the great ascent and steepness of the turnpike road below the point at which the Company were about to raise the same.

Maps or sections of the roads were also produced and verified, shewing the rates of ascent on the old road, (as stated in the judgment); and also shewing, that the Company proposed to make the diverted road for a distance of three hundred and six feet below the crown of the arch, at an ascent of one foot in twenty-eight; and from the crown of the arch to proceed on a level.

The motion for an injunction came on to be heard.

Mr. *Jacob* and Mr. *Bacon* in support of the motion.—The meaning of the 45th clause in the second act is not clear; but the construction would seem to be, that, where a bridge is built on an existing road, there being no diversion of such road, the Company are to be empowered to make an inclination similar to the previous existing rate of inclination of such road; but where a new or deviated road is made, and there is, consequently, nothing to which the term “present inclination” can be referred; then the ascent of the bridge to be built upon the new road, shall not be

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greater than one foot in thirty feet. If, however, it be insisted that the clause ought to be construed as enabling the Company, in the case of a new road being made, to make the rate of ascent equal to that of the former road; still, on either construction, the affidavits and sections which have been produced, shew that the Company are about to deal with this road in a manner which their powers do not authorize. It is clear, both that the actual acclivity is greater than one foot in thirty, and that the comparative acclivity is, and must be, considerably greater on the proposed road than on the present road. The bridge is proposed to be constructed under the road on the ascent of the hill, at a spot where the steepness is already inconvenient to the public; and any increased degree of steepness, must, of necessity, aggravate this inconvenience.

Mr. Knight Bruce and Mr. Duckworth contra.—The clause in the second act has no application to this case: it applies to a state of circumstances not identical with the circumstances here;—to a case where “the *present* inclination of the turnpike road is steeper than one foot in thirty feet.” What is meant by the *present* inclination,—to which of these roads, or to what time does the word *present* refer? The inclination of the road might have been greatly varied after the act passed. The word may refer to the inclination when the act passed, or it may refer to it at some subsequent time; it clearly does not appear to allude to the rate of inclination of the road at the time the comparison was made for the purpose of the present application. The motion must, therefore, depend on the first act, and must be determined by the relative convenience of the two roads. The question is, whether the proposed road is as convenient as the old road, or as near thereto as may be; and there is at least a balance of evidence upon the fact, whether the proposed road is not as convenient as the circumstances will permit.

Supposing, however, the Court to be of opinion that the 45th clause of the second act does apply, a construction must be put upon the entire clause—not excluding any part of it. The Company are empowered under the latter part of the clause to make the diverted road of an acclivity equal to the acclivity of the road for which it is substituted. The measure of the relative acclivity must be taken by comparing the whole with the whole:—by taking the rate of ascent on both roads, from the point of diversion to the point of return; and, if this method of comparison be adopted, it is clear, that the rate of steepness is less on the new road than on the old.

Mr. *Jacob*, in reply.—The affidavits shew, that the diverted road is twenty-eight feet longer than the old road, between the points of diversion and return; and, therefore, it follows of necessity, that when the amount of ascent is spread over the additional length, the rate of ascent is diminished. If such a mode of comparison were adopted, the consequences would be absurd; for a steepness, amounting to a total obstruction, might be created at one spot, provided the average acclivity on the whole be diminished. The trustees of the road, acting for the public, are entitled to take any part of the ascent created by the works of the Company, and compare it with the ascent on the road as it previously existed; and if, on that comparison, the new ascent be at a greater rate than the old, it is not authorized by the act. In the present circumstances, the new road should properly be measured from the place where it leaves the old road, to the crown of the arch of the bridge; and then should be compared with the old road from the same point to the corresponding point on that road.

VICE-CHANCELLOR.—Upon looking at these plans, it seems to me to be evident, that the proposed road is steeper than is authorized by the act of Parliament. Whatever

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may be the inaccuracy of the expression, I think that when the legislature spoke of the “present” inclination of the turnpike road, they meant the inclination of the road, as it might exist at the time of taking the road: all I can do, therefore, will be to consider, whether the existing road, for which a new road is intended to be substituted, is of such a steepness as to authorize the rate of ascent contemplated. Now, it appears to me that there is nothing in that part of the old road, which is intended to be diverted, which justifies the making of the proposed road for a length of three hundred and six feet with a rise of one foot in twenty-eight feet. I am no judge of what is safe for the public beyond this,—if I find that an act of Parliament has declared what shall be the limit of steepness, I must hold that a road which exceeds that limit is not a beneficial road. It appears to me, therefore, that the Company ought not to be permitted to make the new road in the manner proposed by them. No question has been raised before me, respecting the form of the new road, except that relating to its steepness; and except that which was shortly glanced at, namely, the particular formation of the road itself, with which I have nothing to do. It is impossible for me to give any directions as to the quantity or composition of the materials which are to be put on the crown of the arch. It seems to me, that, in this particular case, the 77th section of the first act, and the 45th section of the second act coalesce; and therefore, in framing the injunction, I shall adopt, in a great degree, the words of the present motion. In so doing I shall only be describing, generally, the sort of road which is to be made; certainly not determining any question which may arise as to any particular circumstances incident to the new road when it shall have been wholly or partially made. I think the order should be—to restrain the Company from interfering with the road in the manner proposed, until they shall have made, instead thereof, a sufficient carriage road, as conve-

nient for passengers and carriages, as the Reading and Basingstoke road now is, or as near thereto as may be.

It is objected, that the Company can never know whether they are obeying or disobeying such an injunction. I admit that if the parties cannot agree, whether the new road is as convenient as the old road, or as near thereto as may be, some Court must decide the question; but it seems to me, that I have no method of directing what kind of road is to be made.

[Doubts being expressed by the Counsel for the Company upon the fact as to the relative steepness of the old and the new road, His Honor deferred his final judgment.]

The VICE-CHANCELLOR.—I remain of the same opinion that I expressed on Saturday. Upon a consideration of the maps and sections, it appears to me to be clear that the road and bridge, as proposed, would be a violation of the act of Parliament. In deciding this case I cannot take into consideration that portion of the proposed road which is so constituted with respect to the bridge, that there is no ascent to the bridge from it. It would have been different if the bridge had been something raised up in the middle of a level; but here it is so placed that the crown of the arch happens to be the level of the road, at a certain point above which there is an ascent—and below which there is that which creates the very case of which the legislature are speaking:—namely, “the ascent to a bridge.” If that ascent to the bridge is of so great an average steepness as one foot in twenty-eight feet, it is of a greater steepness than the original road to the same spot. The corresponding portion of the old road consists of several pieces or divisions, varying in their rates of acclivity. The first portion of thirty-three feet has a rise of one foot in thirty-four; the next, likewise, of thirty-three feet, a rise of one foot in thirty-six feet; the next, of thirty-three

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and persons on horseback, passing and repassing; and great quantities of chalk are carried along such road; and the carriages whereby such chalk is conveyed are in general very heavily laden, and it will greatly injure and prejudice all her Majesty's subjects passing on the road if the same is made steeper than it now is. That the Company threaten, and intend, to divert and carry the road over the arch or bridge so as to make the ascent thereto more than one foot in thirty feet; and they have marked out, and begun to form a new road, which they intend permanently to substitute for the existing road, and to carry the same, when substituted, over the arch or bridge in manner aforesaid: and they threaten, and intend as soon as such substituted road shall be made and formed, to take under the powers of their acts the existing road, and to cross or cut through the same, and thereon to form the railway. That the trustees have not authorized and agreed to such diversion of the road; and the only authority ever given to the Company by the trustees, and the only agreement between them, were such as hereinbefore mentioned: and, even if the trustees had so agreed, yet the Company are not authorized to make the ascent to the bridge more than one foot in thirty feet.

That, having regard to the manner in which the road has been marked out, and is intended to be diverted as aforesaid; and, having regard to the height of the arch or bridge as the same has been built by the Company, if the ascent to such bridge for the purposes of such road shall not be more than one foot in thirty feet, the space between the top of such arch or bridge and the surface of the road will not be sufficient for the support of the road; but the same will be dangerous and unsafe, and the weight of the carriages and other vehicles, passing over the same, will be such as to endanger the lives of the persons passing over the arch or bridge; and the same cannot safely be used for carriages laden with lime, chalk, and other heavy articles.

The information prayed, that the Company, their ser-

vants, agents, and workmen, might be restrained by the decree of this Court, and might, in the interim, be restrained by the order or injunction of this Court, from in any manner taking, diverting, cutting through, injuring, or interfering with, the Reading and Basingstoke Turnpike Road, until they should have made, instead thereof, a sufficient carriage road, as convenient for passengers and carriages as the said road then was; and so that the ascent to the bridge or arch, by which the railway should be made to pass under the road, so to be made and substituted, should not be more than one foot in thirty feet: and also from diverting or carrying the intended road, or any other road over the arch or bridge, so as to make the ascent to the said arch or bridge, for the purposes of the road, more than one foot in thirty feet; and from doing or causing to be done, any act or thing, whereby the existing Reading and Basingstoke Turnpike Road, or any road to be substituted for the same, should or might be obstructed, impeded, or rendered less secure or safe, than the same then was, and had been previously thereto, for carriages and passengers; or by which carriages or passengers should be hindered or prevented from passing and re-passing in the same manner as they had theretofore been able to pass and repass; and for further relief.

By the 45th section of the act of the first year of the reign of her present Majesty (not stated in the information), the provisions contained in the clauses before stated, regulating the rates of ascent and descent over and under bridges, by which turnpike and other roads might be made to cross the railway, were repealed, and it was by such section enacted "that where any bridge shall be erected for the purpose of carrying the said railway over or across any turnpike road, public highway, or occupation road, the descent under such bridge shall not, in case of a turnpike road, exceed one foot in thirty feet, and, in case of any other public highway, shall not exceed one foot in twenty feet; and in case of any such

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occupation road, shall not exceed one foot in thirteen feet ; and that where any bridge shall be erected for the purpose of carrying any turnpike road, public highway, or occupation road, over or across the said railway, the ascent of such bridge for the purpose of any turnpike road, shall not be more than one foot in thirty feet ; and for the purpose of any other public highway, shall not be more than one foot in twenty feet ; and for the purpose of any occupation road, not more than one foot in thirteen feet ; except where the present inclination of such turnpike road, public highway, or occupation road, respectively, shall be steeper than one foot in thirty feet, one foot in twenty feet, and one foot in thirteen feet, respectively ; in all which cases the inclination of such roads, in passing the same over or under the said railway, shall in no case be made steeper than the present inclination of such road, respectively, without the previous consent in writing of the trustees, surveyors, or owners respectively of the said roads.

Notice was given of a motion for an injunction, in the terms of the prayer of the information.

Affidavits were filed in support of, and in opposition to the motion : on the part of the informants, verifying the statements of the bill ; and on the part of the Company, first,—denying the agreements as alleged in the information ; secondly,—to shew that it was impossible to avoid, in some measure, raising the turnpike road, in order that the railway might pass beneath ; and thirdly,—that the manner in which the Company were proceeding to construct their works would be most beneficial to the public using the turnpike road, or would, at least, afford a degree of convenience equal to that of the old road. On this point, the following affidavits were read on the part of the Company :—

A. Martin, G. Hewitt, and T. Dodd, deposed, that the level of the summit of the hill in question, situate above the intended point of diversion, and to reach which, every load passing from Basingstoke along the turnpike road

toward Reading must pass, either as the same then existed or should be thereafter diverted, was thirty-five feet higher than the level of the ground at which the intended diversion was proposed to commence on the Basingstoke side of the railway; and twenty-five feet higher than the crown of the arch of the bridge: that, in passing over or along the diverted line of road from Basingstoke to the summit of the hill, the passenger does not, at any time, lose any ascent which he has made.

A. Martin deposed, that the fact was, and J. Macneill deposed that it appeared by the sections which had been taken, that the intended diverted road was about twenty-eight feet longer than the old road, between the same points. A. Martin deposed, that the bridge was constituted at an angle of forty-five degrees to the line of the railway—that the span thereof was thirty feet on the square; that the arch was semi-elliptic, with a rise of nine feet six inches, and two and a half bricks thick; and that he had so informed J. Macneill.

J. Macneill deposed, that the general or average rate of acclivity over the diverted line would be less steep, or more favorable, than over the old road: that taking a given distance, say, one hundred feet, on each side of the bridge on the intended diversion, and of the proposed crossing of the railway on the old road, he found that the rates of acclivity were better on the proposed road than on the old road; and that the rate of acclivity from the bridge to the Reading end of the diversion was, in fact, considerably flatter on the diverted line than on the old line of road. [The affidavit then entered into and detailed several minute calculations, from which the deponent inferred, that the draught would be less severe on the proposed than on the old road; that the actual expense of the difference in draught on the two lines of road would be too slight to be detected, and was inappreciable.]

In support of the information several affidavits were filed

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in reply, exhibiting different results with respect to the abruptness of the acclivity, and the convenience which the proposed works were calculated to afford.

F. Giles deposed, that it was impossible to carry the turnpike road over the arch, in the way proposed by the Company, so as to maintain the present inclination of the road: that, if the same had been carried over the railway by means of an iron top, instead of a brick arch, the present inclination might have been maintained.

J. B. Clacy deposed, that he had measured and taken the levels of the Reading and Basingstoke turnpike road, for a distance of three hundred feet, commencing at that distance from, and proceeding towards the point at which the railway was intended to cross and intersect the road, and that such road forms ascents as follows:—for the first one hundred feet, an ascent of one foot in thirty-one feet seven inches; for the second one hundred feet, an ascent of one foot in twenty-nine feet three inches; and for the third one hundred feet, an ascent of one foot in twenty-six feet one inch. That the road then forming by the Company, being measured at the like distance of three hundred feet from and proceeding towards the summit of the arch or bridge, over which it was intended to convey the last-mentioned road, would form a series of ascents as follows:—for the first one hundred feet, calculating the arch or bridge to be covered with three inches of concrete and six of gravel, an ascent of one foot in twenty-two feet eight inches; and, calculating the arch or bridge to be covered with three inches of concrete and twelve of gravel, an ascent of one foot in twenty-one feet eight inches; for the second one hundred feet, calculating the arch or bridge to be covered with three inches of concrete and six of gravel, an ascent of one foot in twenty-one feet eight inches; and, calculating the arch or bridge to be covered with three inches of concrete and twelve of gravel, an ascent of one foot in twenty-one feet eight inches: for the third one hun-

dred feet, calculating the arch or bridge to be covered with three inches of concrete and six of gravel, an ascent of one foot in twenty-five feet six inches; and, calculating the arch or bridge to be covered with three inches of concrete and twelve of gravel, an ascent of one foot in twenty-four feet six inches.

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W. Winkworth and J. B. Clacy deposed, that the road forming by the Company was, and would be if completed, much steeper than the present inclination of the road at and to the point of intersection; and that, in the judgment and belief of deponents, it was impossible for the Company to make and complete such road as convenient for passengers and carriages as the turnpike road was at and from the place where it was intended to divert the same; and more especially by reason of the great ascent and steepness of the turnpike road below the point at which the Company were about to raise the same.

Maps or sections of the roads were also produced and verified, shewing the rates of ascent on the old road, (as stated in the judgment); and also shewing, that the Company proposed to make the diverted road for a distance of three hundred and six feet below the crown of the arch, at an ascent of one foot in twenty-eight; and from the crown of the arch to proceed on a level.

The motion for an injunction came on to be heard.

Mr. *Jacob* and Mr. *Bacon* in support of the motion.—The meaning of the 45th clause in the second act is not clear; but the construction would seem to be, that, where a bridge is built on an existing road, there being no diversion of such road, the Company are to be empowered to make an inclination similar to the previous existing rate of inclination of such road; but where a new or deviated road is made, and there is, consequently, nothing to which the term “present inclination” can be referred; then the ascent of the bridge to be built upon the new road, shall not be

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greater than one foot in thirty feet. If, however, it be insisted that the clause ought to be construed as enabling the Company, in the case of a new road being made, to make the rate of ascent equal to that of the former road; still, on either construction, the affidavits and sections which have been produced, shew that the Company are about to deal with this road in a manner which their powers do not authorize. It is clear, both that the actual acclivity is greater than one foot in thirty, and that the comparative acclivity is, and must be, considerably greater on the proposed road than on the present road. The bridge is proposed to be constructed under the road on the ascent of the hill, at a spot where the steepness is already inconvenient to the public; and any increased degree of steepness, must, of necessity, aggravate this inconvenience.

Mr. *Knight Bruce* and Mr. *Duckworth* contra.—The clause in the second act has no application to this case: it applies to a state of circumstances not identical with the circumstances here;—to a case where “the *present* inclination of the turnpike road is steeper than one foot in thirty feet.” What is meant by the *present* inclination,—to which of these roads, or to what time does the word *present* refer? The inclination of the road might have been greatly varied after the act passed. The word may refer to the inclination when the act passed, or it may refer to it at some subsequent time; it clearly does not appear to allude to the rate of inclination of the road at the time the comparison was made for the purpose of the present application. The motion must, therefore, depend on the first act, and must be determined by the relative convenience of the two roads. The question is, whether the proposed road is as convenient as the old road, or as near thereto as may be; and there is at least a balance of evidence upon the fact, whether the proposed road is not as convenient as the circumstances will permit.

Supposing, however, the Court to be of opinion that the 45th clause of the second act does apply, a construction must be put upon the entire clause—not excluding any part of it. The Company are empowered under the latter part of the clause to make the diverted road of an acclivity equal to the acclivity of the road for which it is substituted. The measure of the relative acclivity must be taken by comparing the whole with the whole:—by taking the rate of ascent on both roads, from the point of diversion to the point of return; and, if this method of comparison be adopted, it is clear, that the rate of steepness is less on the new road than on the old.

Mr. *Jacob*, in reply.—The affidavits shew, that the diverted road is twenty-eight feet longer than the old road, between the points of diversion and return; and, therefore, it follows of necessity, that when the amount of ascent is spread over the additional length, the rate of ascent is diminished. If such a mode of comparison were adopted, the consequences would be absurd; for a steepness, amounting to a total obstruction, might be created at one spot, provided the average acclivity on the whole be diminished. The trustees of the road, acting for the public, are entitled to take any part of the ascent created by the works of the Company, and compare it with the ascent on the road as it previously existed; and if, on that comparison, the new ascent be at a greater rate than the old, it is not authorized by the act. In the present circumstances, the new road should properly be measured from the place where it leaves the old road, to the crown of the arch of the bridge; and then should be compared with the old road from the same point to the corresponding point on that road.

VICE-CHANCELLOR.—Upon looking at these plans, it seems to me to be evident, that the proposed road is steeper than is authorized by the act of Parliament. Whatever

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nient for passengers and carriages, as the Reading and Basingstoke road now is, or as near thereto as may be.

It is objected, that the Company can never know whether they are obeying or disobeying such an injunction. I admit that if the parties cannot agree, whether the new road is as convenient as the old road, or as near thereto as may be, some Court must decide the question; but it seems to me, that I have no method of directing what kind of road is to be made.

[Doubts being expressed by the Counsel for the Company upon the fact as to the relative steepness of the old and the new road, His Honor deferred his final judgment.]

The VICE-CHANCELLOR.—I remain of the same opinion that I expressed on Saturday. Upon a consideration of the maps and sections, it appears to me to be clear that the road and bridge, as proposed, would be a violation of the act of Parliament. In deciding this case I cannot take into consideration that portion of the proposed road which is so constituted with respect to the bridge, that there is no ascent to the bridge from it. It would have been different if the bridge had been something raised up in the middle of a level; but here it is so placed that the crown of the arch happens to be the level of the road, at a certain point above which there is an ascent—and below which there is that which creates the very case of which the legislature are speaking:—namely, “the ascent to a bridge.” If that ascent to the bridge is of so great an average steepness as one foot in twenty-eight feet, it is of a greater steepness than the original road to the same spot. The corresponding portion of the old road consists of several pieces or divisions, varying in their rates of acclivity. The first portion of thirty-three feet has a rise of one foot in thirty-four; the next, likewise, of thirty-three feet, a rise of one foot in thirty-six feet; the next, of thirty-three

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feet, a rise of one foot in thirty feet; the next, of thirty-three feet, has a rise of one foot in twenty-eight feet; the next, of thirty-three feet, has a rise of one foot in twenty-six feet.

Then there is a small piece of nine feet, which has a rise of one foot in thirty-one feet; then one of twenty-four feet, which has a rise of one foot in twenty-four feet; then one of thirty-seven feet, which has a rise of one foot in thirty-two feet. It is manifest, therefore, upon this statement, that the average steepness of the old road is less than one foot in twenty-eight feet.

There is another point of view in which it will clearly appear, that the proposed road is steeper than the old road. Reckoning from the point of diversion to the crown of the arch of the bridge, the length of the proposed road is three hundred and six feet; and the crown of the arch is three feet three inches higher than the corresponding point on the old road. The distance of that corresponding point on the old road, from the point of diversion, is two hundred and thirty-five feet; but to attain an height equal to that of the crown of the arch of the proposed bridge, it is necessary to go one hundred feet further; consequently, to attain the same height, requires a greater length on the old road than upon the proposed road; there can, therefore, be no difficulty in coming to the conclusion, that the proposed road is steeper than the old road; and, consequently, the inclination of the proposed road being steeper than one foot in thirty feet, and also greater than that of the old road, it is against the provision of the first part of the 45th section of the second act, and is not within the protection of the exception in the second part of the same section.

The injunction which is sought by this motion is not, however, precisely the order which I think the Court ought to make. The latter part of the order asked, which de-

parts from the terms that are found in the act of Parliament, cannot be introduced in the injunction.

The order as drawn up restrained the defendants "from in any manner taking, diverting, cutting through, injuring, or interfering with, the Reading and Basingstoke Turnpike Road, in the pleadings mentioned, until the said defendants shall have made instead thereof, a sufficient carriage road as convenient for passengers and carriages, as the said Reading and Basingstoke Turnpike Road now is, or as near thereto as may be; but yet, so that the ascent to the bridge or arch, by which the said railway shall be made to pass under the said road, so to be made and substituted as aforesaid, for the purposes of such last-mentioned road, shall not be more than one foot in thirty feet, unless the same shall be so constructed as not to be made steeper than the present inclination of the said Reading and Basingstoke Turnpike Road."

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Dec. 14th. Between HER MAJESTY'S ATTORNEY-GENERAL, at the relation of W. WALTON, - Informant,
and
THE LONDON AND SOUTHAMPTON RAILWAY
COMPANY, - - - - - Defendants.

The 9th section of the London and Southampton Railway Act, empowered the Company to make in, upon, across, under, or over any lands, streets, hills, vallies, and roads, such inclined planes, tunnels, embankments, bridges, arches, and piers, as the Company should think proper, according to the provisions and subject to the restrictions of the act.

The 74th section provided, That where any bridge should be erected by

the Company, for the purpose of carrying the railway over or across any turnpike road, or other public highway, the span of the arch thereof, should be of such width, as to leave a clear and open space under every such arch, of not less than fifteen feet.

The 77th section provided, that where, in the exercise of the powers of the act, any part of any carriage or horse road, either public or private, should be found necessary to be cut through, diverted, raised, sunk, taken, or so much injured as to be impassable, the Company should previously thereto, cause a sufficient road to be made instead thereof, as convenient for passengers and carriages as the road to be cut through, or as near thereto as might be.

The Company erected a bridge over a turnpike road, at a place where the width of the then existing road was forty feet; and, owing to such bridge crossing the road obliquely, and to the piers of the bridge being built on the road, the passage under the arch of the bridge, left a width of road of twenty-four feet only, for a distance of one hundred and sixty feet.

Held, by the Vice-Chancellor, that the restrictions imposed by the 77th section, applied only to a case where a road might be either temporarily or permanently diverted;—that under the 9th section, the Company were empowered to erect any piers or necessary buildings for a bridge, provided they left a width under such bridge of fifteen feet, as provided for by the 74th section.

THE information stated, that in the 4th year of the reign of George the Fourth, an act was passed, intituled “An Act for better and more effectually improving and keeping in repair the road leading from the town of Kingston-upon-Thames, in the county of Surrey, to a place called Sheetbridge, near Petersfield, in the county of Southampton,” whereby it was among other things enacted, That such turnpike road should be divided into, and be two separate districts, one of which should be called the upper district; and that the several persons therein mentioned, and their successors, and the other persons in the act mentioned, should be trustees, with respect to the said upper district, for amending, widening, altering, improving, and keeping in repair, the turnpike road, leading from the town of Kingston-upon-Thames to Sheetbridge, aforesaid: and for carrying into execution the said act, and also such of the powers and provisions of an act, made in the 3rd year of the reign of George the Fourth, intituled “An Act to

amend the general laws, now in being, for regulating turnpike roads, in that part of Great Britain called England, as were not expressly varied, altered, or otherwise provided for by the now stating act.

That, by the act of the 3rd year of the reign of George the Fourth, it was enacted, that the trustees and commissioners of every turnpike road, might sue and be sued, in the name or names of any one of such trustees or commissioners, or of their clerk or clerks for the time being. That the trustees for the time being, acting under the powers and provisions of the said acts, have, from time to time, improved and kept in repair, the said upper district of the said turnpike road, leading from Kingston to Sheet-bridge, aforesaid; and which said upper district forms part of the high road from London to Portsmouth, and passes in its course, over a certain common, called Ditton Marsh, in the parish of Thames Ditton, in the county of Surrey.

That there is at all times, both during the day and night, very considerable traffic upon the said road by coaches, waggons, and other vehicles, passing and repassing; and in consequence thereof, it has been found necessary, for the benefit and safety of the public journeying and passing thereon, that the said road should be of considerable width, that is to say, of the width of thirty-eight feet, or thereabouts; and the trustees for the time being, acting under the powers and provisions of the said acts, have maintained and kept the said road at the width of thirty-five feet, or thereabouts, for and through the whole length thereof; and the said road hath been for many years past, and now is, of the width of thirty-five feet, or thereabouts, except in some very few instances, and in no place is it of a less width than thirty feet, for any distance or length upon the main road of one hundred and sixty feet; and the road where it passes over Ditton Marsh is of the width of thirty-eight feet, or thereabouts: and the trustees have, from time

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to time, since the passing of the act, in consequence of the increasing traffic thereon, laid out and expended considerable sums of money in the purchase of lands and in other ways for the purpose of widening the said road, under the powers and provisions of the said acts, and rendering the same more commodious for the public.

[The information then stated the London and Southampton Railway Act (*a*).]

That, by the last-mentioned act, the Company are authorized and empowered—for the purposes, and according to the provisions and restrictions of the act,—to construct bridges or arches for the purpose of carrying the railway over or across any turnpike road or other public highway; and the span of the arch of such bridges shall be formed, and shall at all times be, and be continued of such width, as to leave a clear and open space under every such arch, of not less than fifteen feet, and of a height from the surface of such turnpike road to the centre of such arch, of not less than sixteen feet. That the line of the intended railway passes over Ditton Marsh, aforesaid, and there meets with, and crosses the line of direction, of the upper district of the said turnpike road, from Kingston-upon-Thames to Sheetbridge, making a very small angle with such turnpike road.

[The information then stated certain proposals by the Company to the trustees, relating to the railway crossing the road by a bridge, but which met with a decided disapproval on the part of the trustees.]

That, shortly after such refusal as aforesaid on the part of the trustees of the turnpike road, to sanction such version of the said road, the Company by their servants agents, commenced digging the foundations of, and making preparations for building an arch over the said turnpike road at Ditton Marsh; and set out the same of the

(*a*) Ante, p. 284.

of twenty-four feet only ; and such arch would extend along the road to the length of one hundred and sixty feet ; and, by so doing, they will cause great obstruction and nuisance to the traffic on the road, and will render the same exceedingly dangerous to the public travelling thereon ; and such arch, if allowed to be built as aforesaid, will lessen the present width of the road from forty feet to twenty-four feet, for the length of one hundred and sixty feet, and thus render the road insufficient for the purposes of the traffic upon and along the same.

[The information then stated a notice given by the road trustees to the Company to discontinue their works.]

That, notwithstanding such notice, the Company continued to proceed, and are now proceeding with all possible speed, to build or complete their said arch across the said road at Ditton Marsh ; and the arch is set out, and intended to be of the width of twenty-four feet only, which is a width altogether inadequate to the traffic on the said road. That, if the arch be permitted to be built across the road, of the width of twenty-four feet only, considerable danger must, and will arise to the coaches, carriages, and other vehicles, and the passengers and goods going thereby ; by reason of the narrowness of the road at that part ; and the same will be a public nuisance, and the public will be greatly injured thereby.

That considerable danger will arise if the turnpike road be narrowed at any part thereof, to a width of less than thirty feet ; and any arch across the road, of less width than thirty feet at the least, will materially impede the traffic on the road, and render the same unsafe for carriages, coaches, and other vehicles, travelling along the same, and will be a public nuisance.

That the trustees, for the purpose of maintaining and keeping the said road in a proper state for the great traffic which there is upon the same, have, from time to time, and at all times, kept the road from one end thereof to the

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other of an average width, of not less than forty feet; and in many parts, not less than sixty feet, except in some few places: but in no such places is it of a less width than thirty feet, for a distance of one hundred and thirty feet along the said road; and that an average width of forty feet is necessary for the benefit and safety of the public passing and repassing thereon. That, according to the true construction of the last-mentioned act, the Company are bound to build, and construct arches, over or across the road, of a greater width than fifteen feet, and, in every respect adequate to the necessities and purposes of such road; and the space of fifteen feet, in the act mentioned, is restrictive only, and binding upon the Company, not to construct any arches of less width than fifteen feet. That the railway, wherever it shall cross the road, shall and ought to be made and constructed, in such manner as to prevent, as far as may be practicable, any obstruction to the passage along the road.

The information prayed, that it may be declared by this honourable Court, that the said arch-work or erection so caused to be made or erected by the said Railway Company, upon or over the said turnpike road at Ditton Common, aforesaid, is a public nuisance, and that the same ought to be abated, and may be abated accordingly: and that the London and Southampton Railway Company, and their agents, may be restrained by the order and injunction of this honourable Court, from making, building, or erecting, or proceeding to make, build, or erect the said work, arch, or building, upon or across the said turnpike road, so commenced by them as aforesaid, or from hindering or obstructing the said turnpike road; and that they may be restrained in like manner, from making or erecting, or proceeding to make or erect, any other work, arch, or building, upon or across the said turnpike road, so as to obstruct or narrow the public highway, or passage under the same, to the nuisance and injury of the public; and for further relief.

The material sections of the act are the 9th, the 74th, & the 77th. The 9th section (being the section conferring on the Company the usual powers for making and maintaining the railway, in similar terms to like clauses in all other railway acts,) among other things enacts, That for the purposes and subject to the restrictions of the act, it shall be lawful for the Company, their deputies, engineers, contractors, servants, agents, and workmen, and all other persons by them authorized, and they are hereby empowered for the purposes, and according to the provisions, and subject to the restrictions of this act, to make or construct in, upon, across, under, or over the railway or other works; and in, upon, across, under, or over, any lands, streets, hills, valleys, roads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, bridges, arches, piers, roads, ways, passages, conduits, drains, culverts, cuttings, and fences, as the said Company shall think proper.

The 74th section enacts, That where any bridge shall be erected by the Company, for the purpose of carrying the railway over or across any turnpike road, or other public highway, the span of the arch of such bridge shall be formed, and shall at all times be, and be continued of such width, as to leave a clear and open space under every such arch, of not less than fifteen feet, and of a height, from the surface of such turnpike road to the centre of such arch, of not less than sixteen feet; and of a height from the surface of any other public highway to the centre of such arch, of not less than fourteen feet; and the descent under such bridge, in case of a turnpike road, shall not exceed one foot in thirty feet, and in case of any other public highway, shall not exceed one foot in thirteen feet.

The 77th section enacts, That in all cases in which in the exercise of any of the powers hereby granted, any part of any of the carriage or horse roads, either public or private, shall be found necessary to be cut through, diverted,

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raised, sunk, taken, or so much injured, as to be impassable for passengers or carriages, or the persons entitled to the use thereof; the Company shall, at their own expense, and before any road shall be so cut through, diverted, raised, sunk, taken, or injured, as aforesaid, cause a sufficient carriage or horse road (as the case may require,) to be set out and made instead thereof, as convenient for passengers and carriages, as the road to be cut through, diverted, raised, sunk, taken or injured, as aforesaid, or as near thereto as may be; and shall cause the same to be put into good and substantial order and condition, where the former road cannot more easily be restored; and when the road cut through, diverted, raised, sunk, taken, or injured, shall be a turnpike road,—the substituted road, if temporary, shall be set out and made as aforesaid, and the principal road shall be restored within six calendar months, next after the commencement of the operation;—and the railway, where it shall cross such turnpike road, shall be constructed and kept in repair, in such manner as to prevent, so far as may be practicable, any obstruction to the passage along such turnpike road.

[Notice of a motion for an injunction, in the terms of the prayer of the bill, was given on the part of the Attorney-General.]

Affidavits were filed on both sides, and were directed to the fact of the bridge as proposed, at the place in question, causing any injury or inconvenience to the public travelling.

In support of the information, the affidavits stated the nature and extent of the traffic on the road; and that in the opinion of the deponents, much inconvenience would be occasioned, if the proposed bridge were erected.

On the part of the Company, the affidavits stated, that for longer distances, in many parts of the same road, a less width than that proposed by the tunnel or arch over the road existed; and measurements of the width of the same

road, at the different places, and for the following distances were set forth; namely, a width varying from twenty-one to twenty-six feet, in a length of four hundred and two feet; a width of twenty-four feet in a length of four hundred and sixty-two feet; a width of twenty-three feet six inches, in a length of four hundred and sixty-two feet. Between the second and third milestones from London, a width varying from twenty-three feet four inches, to seventeen feet eight inches, in a length of four hundred and sixty-two feet. At Fulham, near London, a width varying from twenty-three feet to fifteen feet ten inches, in a length of four hundred and seventy-one feet; a width varying from twenty-two feet nine inches to eighteen feet, in a length of three hundred and ninety-six feet. Putney-bridge, near London, in width, except in certain recesses, twenty-two feet ten inches, in length seven hundred and ninety-two feet. The widths of Westminster and Blackfriars bridges, and the comparative traffic thereon, and at the place in question, were also mentioned and contrasted.

Mr. *Knight Bruce*, Mr. *Le Neve Foster*, and Mr. *Sugden*, for the motion.—It is manifest, that, when the legislature, in the 74th section of the act, specify a width of not less than fifteen feet, and a height of not less than sixteen feet, they do not mean to say, that in no case can it be necessary to make a greater width or a greater height; but in no case were those measures to be less. The legislature had evidently in contemplation, the probability of a much greater width being required in many instances; and with that view was the latter part of the 77th section framed,—“Not less than fifteen feet,” could never be intended to express “Not more than fifteen feet.” *Primâ facie*, the present existing width of a road, must be taken to be the necessary and proper width.

The principle laid down as governing all these acts, is, that the public are not to be injured by any powers which

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may have been gained from Parliament, without the public interest having been sufficiently consulted. *Blakemore v. The Glamorganshire Canal Company* (a).

The General Turnpike Act (5 & 6 Will. 4, c. 50, s. 69.) contains an express enactment for the prevention of encroachments on highways. It is thereby provided, That if any person shall encroach on any highway, by making or causing to be made, any building, hedge, ditch, or other fence, or any carriage-way or cart-way, within the distance of fifteen feet from the centre thereof, every such person so offending, shall incur certain penalties. It therefore appears, the legislature adjudges thirty feet to be the standard width of convenience for public roads.

The general powers given by the 9th section, are to be subject to the conditions and restrictions in the act contained. That section contains a general allusion to the different modes of obviating and overcoming the different impediments in the line of the railway; the material words are —“and also for the purposes, and according to the provisions and restrictions of this act, to construct or make in, upon, across, under, or over the railway and other works; and in, upon, across, under, or over any lands, streets, hills, vallies, roads, rivers, canals, brooks, streams, &c.” In subsequent sections of the act, the above prepositions are variously appropriated to the different substantives following them in the 9th section; certain of them are used when speaking solely of rivers,—certain others when speaking solely of hills and vallies; and in the 74th clause, which relates entirely to roads, all the above prepositions except “over and across” are omitted: therefore, in regulating the powers conferred by the 9th section as to roads, the Company must be restricted by the 74th section, to passing “over or across” them.

The existing convenience of the turnpike road, now

(a) 1 Myl. & Kee. 162.

sought to be destroyed, has been attained at a great expense. The legislature could not have intended to deprive the public of the benefit resulting from that outlay.

Mr. *Wigram* and Mr. *Duckworth*, in opposition to the motion.—If it had been the intention of the legislature, that in passing a bridge over a road, the then existing width should be preserved, it would have been easy to have said so in one short and simple clause.

The preamble of the act states “ That the railway will be a great public good, by opening a cheap and expeditious communication between the metropolis and Southampton;” and therefore, the public good has received the fullest consideration. It must be borne in mind, that Parliament does not allow these acts to pass without notice being given to every person whose interests can be possibly affected thereby. The standing orders of the House of Commons require notice to be given to every landholder on the proposed line, and wherever there are either canals, roads, or other classes of property, which require special protection, express clauses are always introduced exempting such property from the general powers of the act. Thus, we find that the 18th section protects the Surrey Iron Railway, by prescribing the dimensions of a bridge to cross it:—The 19th section, specially protects the River Wey Navigation:—The 21st section, specially protects certain ponds and reservoirs:—The 22nd section, protects the Itchen River Navigation. A public road is in no way distinguished from these subjects of property; and the trustees having notice, might, had they wished to do so, have applied to Parliament to protect their road:—The 70th and several consecutive sections, shew that the case of public or turnpike roads was most carefully considered by the legislature; and yet it is said, that their width was not taken into consideration.

It cannot be disputed that, if the words “ according to

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the provisions and subject to the restrictions of this act," had been omitted in the 9th section, the Company would, under that clause, be empowered to construct their railway, in, upon, across, under, or over any roads, as they should think proper. The question is, not what particular preposition applies by nice grammatical implication, to this or that subject of property, among the many enumerated in that section, but what are the restrictions manifestly imposed by the subsequent clauses of the act:—these are, that the Company in making a bridge across a turnpike road, are to do as little damage as they conveniently can, and they must make the road under such bridge of a width of fifteen feet at the least. The argument which has been derived from the general turnpike act is rather in favour of than against the Company: for a turnpike act, providing generally that no road shall be encroached upon, within a width of thirty feet, cannot be intended to interfere with, or control a particular specific enactment in an express railway act.

In the case of *Blackemore v. The Glamorganshire Canal Company* (a), Lord Eldon has said, "These acts of Parliament are to be considered as contracts between the public and those who obtain the acts" (b).

The present complaint is between the two contracting parties:—the Company on the one hand, and the public, represented by the Attorney-General, on the other. The complaint is not founded on the contract—it is not attempted to be said, that the contract existing between the two parties has been broken; but the information seeks to shew, that the Company are doing an act, which, being not included in the powers of the act, and therefore, independent of the contract, is a nuisance at common law. If an injunction be granted, it will be the first case where the Court of Chancery has interfered in a case of disputed

(a) 1 Myl. & Kee. 162.

derson, B., in *Lee v. Milner*, 2

(b) See also what is said by Alderson, B., in *Lee v. Milner*, 2

You. & Coll. 618.

nuisance, without first calling on the party complaining, to establish the fact of nuisance at law. *Attorney-General v. Cleaver* (a).

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Mr. *Knight Bruce*, in reply.—The 9th section, construed independently of the 73rd & 76th sections, gives no authority to the Company in the crossing of a turnpike road, to occupy any portion of such road with buttresses or buildings :—a power to cross a road and a power to build upon a road are most distinct things ; and if any additional proof of the intention of the legislature were wanted, it is supplied by the 74th section, which, omitting the preposition “upon,” merely says “over or across.”

The object of providing, that under no circumstance should a less width than fifteen feet be left under any arch is manifest. There might be places on an existing turnpike road, which might be less than fifteen feet at the time of being crossed by the railway ; but, having regard to the possibility of future improvement at such places by the road trustees, the legislature enacted, that under no circumstances where the consequences would be to preclude improvement, should the width of the road be less than fifteen feet.

Private rights are invariably protected in these acts ; the Company cannot enter on any lands without a previous verdict of a jury, and a payment or deposit of the value assessed. If it was contemplated that they might take for their buildings, the soil of a highway, why were not similar provisions for such a case included in the act ? Although it is called the king's highway, the soil of the road belongs not to the crown, but to the proprietors of the land on each side ; and if the highway become disused, it reverts to those proprietors.

With respect to the proof of relative convenience, the

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sole question may be thus summed up—Is, for the purpose of public traffic, a confined space of twenty-four feet in width, as convenient as an open unconfined space of forty feet in width, for a length of one hundred and sixty feet.

The VICE-CHANCELLOR.—In this case it is to be observed, that the terms of the 9th section, if unrestricted, would empower the Company, not merely to make a bridge across a road, but to erect piers and arches in and upon a road; but the general power given by that section is clearly intended to be restricted to a certain extent, because the Company are only enabled to do those things which the enabling clause gives them the power to do, according to the provisions and restrictions of the act. Then when you look at the 74th section, you find it enacted,—[His Honor read the section.] Now I should have thought *prima facie* the Company might exercise the general powers of the 9th section; provided that, in crossing any public road and turnpike road with a bridge, they did not so construct the bridge, as to make the open space less than fifteen feet. That seems to me to be the plain and clear meaning of the language; and they may, as I understand it, actually erect the piers which shall support the bridge upon the road, provided that, where the bridge be constructed by means of those piers, there shall be a clear open space, of not less than fifteen feet.

It is said, however, that such cannot be the construction, because of certain expressions in the 77th section. [His Honor read the section.] Now, that section points to two things;—to a case where, in order to erect works for a temporary purpose, it may be necessary to divert an existing turnpike road—or a case where it may be necessary, not merely to divert the turnpike road for a certain time, but absolutely and altogether for an indefinite time; and then it provides, that the railway, where it crosses the turnpike road, shall be constructed and kept in repair in such

manner, so far as may be practicable, as to prevent any obstruction to the passage along the turnpike road. That is a provision which appears to me on the face of the section, not to be a general provision applying to all the other sections of the act; but to be a provision that applies to the particular cases therein contemplated;—namely, the case where there is a diversion of the road for any particular purpose, which diversion may be either temporary or permanent; but it has no relation, as it appears to me, to the case contemplated by the 74th section, which is only a modification of the general powers given by the 9th section. It appears to me, it would be useless to consider here whether the consequences of the enactments of the legislature, may or may not produce inconvenience, or perhaps, damage to the public of a worse kind than inconvenience;—because the law of the land determines what shall be the convenience, both of the public and of individuals. And therefore, merely sitting here as a judge, I cannot enter into a speculation as to such consequences. It was for the legislature to determine the powers they thought proper to give, and to define those powers in such language as they thought proper to use.

It appears to me to be beyond a doubt upon this act of Parliament, that, provided the open space left under the bridge is not less than fifteen feet, the Company may both erect the piers to support the arch or the bridge upon the road itself, and may make the bridge in any manner they please; and I think, therefore, that there is no foundation for this application. But though that is my opinion on looking at this act, and an opinion I must observe, that necessarily makes it right for me not to grant the injunction, yet, if the relators or those who conduct the suit against the Southampton Railway Company, think it advisable that they should take the opinion of a Court of law, with a view to establish their right to the interference of the Court, I

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certainly shall give them leave so to do ; but at present, I shall not grant the order that is asked for. If those who conduct the suit in the name of the Attorney-General, think it right to take the opinion of a Court of law, I must, of necessity, defer the further consideration of this matter and the question of costs, until I know the result of any proceedings they may think proper to take.

It seems to me it is but due to the Attorney-General, whose name is affixed to the information, that the opinion of a Court of law should be taken if he desires it. It seems to me there are many ways in which the thing might be tried: it might be tried probably by indictment, and there is a question whether it might not be tried under the act which has been referred to (a).

(a) The General Turnpike Act.

COURT OF QUEEN'S BENCH.

Sittings at Westminster.

BEFORE LORD DENMAN, C. J., AND A SPECIAL JURY.

THE QUEEN, on the prosecution of the IN-
HABITANTS OF PINNER,
against

THE LONDON AND BIRMINGHAM RAILWAY
COMPANY.

1839.

February 15th.

THE line of the London and Birmingham Railway intersects a parish-highway, leading from Stanmore to Pinner and Uxbridge, near to a farm-house called the Dove House; and the level of the railway and the road in its original condition, were, as nearly as possible, the same.—It was originally intended to cross the road on a level, but this plan was abandoned, and a bridge erected over the railway. In consequence of this change, it became necessary to divert the road for rather more than a quarter of a mile, in order to carry it more conveniently over the railway:—

By the London and Birmingham Railway Act, the Company are empowered to make roads over the railway, and for that purpose to alter the course of, or raise any road or way.

Section 63 provides, that when any turnpike or public

carriage road shall be carried over the railway, the road shall be of the clear width of fifteen feet, within the fences of the bridge.

And by section 67, where any part of any carriage or horse road, shall be cut through, raised, sunk, or taken, the Company shall cause another *good and sufficient road* to be made instead thereof, *as convenient for passengers and carriages as the former.*

The Company diverted a highway, and erected a bridge to carry it over the railway. The original road was forty feet wide, and the substituted one only twenty-seven, less convenient for driving sheep and cattle. The span of the bridge was thirty-three feet, but it was continued with wing-walls and parapets to the distance of one hundred and sixty-eight feet, and the width of the road on the bridge and between the parapets, was only sixteen feet.

Held, that the new road being narrower, was not *as convenient* as the old one, nor a *good and sufficient road*, within the meaning of the 67th section, the act intending it to be as convenient for a drift-way as for passengers and carriages.

Held, also, that fifteen feet is the maximum width required by the act for such bridges; but that the Company had no right to contract the road by the wing-walls and parapets, beyond the span of the bridge.

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this the Company were empowered to do by the 8th section of their act.

The chief difference between the two roads consisted in the width the old road being forty feet wide between the fences; of which twenty-two feet was hard carriage-road, and six feet foot-path, (as set out by the commissioners under the Harrow Inclosure Act), and the rest green sward. The carriage road made by the Company was twenty-four feet wide, with a foot-path of three feet. The span of the arch over the railway was thirty-three feet, and the width of the road over the bridge, sixteen feet between the fences; but, in consequence of the bridge being what is technically termed askew, the Company, for greater safety, had extended the wing-walls with parapets, to the distance of one hundred and sixty-eight feet in length, and of the same width as the bridge; so that as far as the parapet walls reached, the road was only sixteen feet wide.

In Michaelmas Term, 1837, a mandamus was issued, directed to the Company, in which, after reciting the act of Parliament for making the London and Birmingham Railway (*a*), and reciting that it was by the said act, among other things, enacted, that, for the purposes and subject to the provisions and restrictions of that act, it should be lawful for the Company, their agents and workmen, and all other persons by them authorized, and they were thereby empowered, to make or construct upon, across, under or over, the railway, or other works, or any lands, streets, hills, valleys, roads, rail-roads or tram-roads, rivers, canals, brooks, streams or other waters, such inclined plains, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences, as the Company should think proper; and also to divert or alter the course of any roads or ways, or to raise or sink any roads or ways, in order the more conve-

(*a*) See *ante*, pp. 121, 160.

niently, to carry the same over or under, or by the side of the railway. And that the lands to be taken for the line of the railway should not exceed twenty yards in breadth, except in those places upon the line of such railway where a greater breadth should be judged necessary for the purposes therein mentioned: and except also on commons, downs, or waste lands, unless with the previous consent in writing of the owners and occupiers of any lands which the Company should be desirous of appropriating to the obtaining greater space for the purposes therein mentioned. And that, where any bridge should be erected for carrying any turnpike road, or public carriage-road over the railway, the road over such bridge should be formed, and should at all times be continued of such width, as to leave a clear and open space between the fences of such road, *of not less than fifteen feet*; and the ascent of every such bridge, for the purpose of such turnpike-road or public carriage-road, should not be more than one foot in thirty feet. And that in all cases wherein, by the exercise of any of the powers thereby granted, any part of any carriage or horse road, railway, or tram-road, either public or private, should be found necessary to be cut through, raised, sunk, taken, or so much injured, as to be impassable or inconvenient for passengers or carriages, or the persons entitled to the use thereof, the Company should, at their own expense, before any such road should be so cut through, raised, sunk, taken, or injured as aforesaid, *cause another good and sufficient road*, as the case might require, to be set out and made instead thereof, *as convenient for passengers and carriages* as the road to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as might be.

[The mandamus then recited an act of Parliament made in the 6th year of the reign of William the Fourth, for enabling the London and Birmingham Railway Company to extend and alter the line of such railway (a), whereby

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a certain clause in the first-mentioned act, regulating the dimensions of any bridge for carrying any turnpike road or public carriage-road over the railway, was repealed.]

That it was, by the act of the 6th of William the Fourth, enacted, That where any bridge should be erected, for carrying any turnpike-road, highway, or occupation-road, over the railway, the road over such bridge should be formed, and should at all times be continued, of such width, as to leave a clear and open space between the parapet walls or fences of such road, of *not less than fifteen feet*, and the ascent of every such bridge, for the purpose of any such turnpike road, should not be more than one foot in thirty feet; and for the purpose of any such highway, not more than one foot in twenty feet; and for the purpose of any such occupation-road, not more than one foot in thirteen feet, and a good and sufficient parapet wall or fence should be made on each side of every such bridge; which parapet wall, or fence, should not be less than four feet above the surface of such bridge.

And also reciting, that the Court had been given to understand and been informed, that the Company, the defendants, in execution of the powers of the act, and for the purposes thereof, had taken and diverted part of a certain public road, leading from Stanmore, in the county of Middlesex, to Uxbridge in the same county, near to certain premises called the Dove House, in the occupation of John Tilbury, and lying and being in the hamlet of Pinner, the said county, such part of the said road, so taken and diverted by them as aforesaid, *then being of the width forty feet between the fences*, that is to say, twenty feet in width thereof then being maintained as a road; and three feet in width thereof then being maintained as a raised footway, for the convenience of passengers, and the remaining fifteen feet in width being occupied by green sward, along the side of the road, and the necessary water-courses for draining

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And that the Company had also caused a certain bridge to be erected, for carrying such last-mentioned road over the railway, extending the parapet walls thereof, on each side, beyond the width of the railway over which it is erected, in and along the road substituted by the Company in lieu thereof, as hereinafter mentioned; and that the Company, in lieu of such part of the said road as had been taken and diverted by them as aforesaid, had set out and made a road *in no part thereof exceeding twenty-seven feet in width* between the fences, inclusive of a footway three feet wide extending along the whole length of the substituted road, except along the length of the bridge and parapet walls thereof, which extend one hundred and fifty-six feet; and as to one hundred and fifty-six feet in length thereof, between the parapet walls of the bridge, and which walls extend along the said substituted road, on each side over the railway, *of the width of sixteen feet only, and no footway.*

And also reciting, that the Company were duly required, on behalf of the inhabitants of the said hamlet of Pinner, to cause another good and sufficient road, with a footway and bridge, to be set out and made as required by the acts of Parliament; but that they, the Company, had wholly neglected and refused, and still did neglect and refuse to do so, in contempt, &c., and to the great, &c., whereupon, &c.

The Court commanded the said Company, immediately after the receipt of the writ, to set out and make, or cause to be set out and made, a good and sufficient road, together with a footway and bridge, as required by the said acts of Parliament, instead of such parts of the said road, leading from Stanmore to Uxbridge, as the said Company had taken and diverted as aforesaid, or that they should shew cause to the contrary, &c.

The return of the Company, dated the 19th of April,

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1838, after stating, that in the execution of the powers of the act, the road described in the mandamus had, as therein mentioned, been taken and diverted, proceeded to certify that they had caused a certain bridge to be erected, for carrying the road diverted by them over the railway, extending the parapet walls of the bridge on each side, as far as was absolutely necessary for the purpose aforesaid, and no farther. And that, in lieu of the part of the said road which had been taken and diverted, they had set out and made a certain other road, with a certain footway thereto.

[The return then stated, in the language of the second act, that the provisions therein contained, hereinbefore set forth, had been complied with in the erection and formation of the bridge.]

And that the road and the footway to the same, so set out and made on each side of the bridge, *are a good and sufficient road and footway, and as convenient for passengers and carriages, as the said road and footway taken and diverted by them*, as aforesaid. And that they had set out and made *a good and sufficient road*, together with footway and bridge, as required by the acts of Parliament, in the said writ mentioned, instead of the part of the road leading from Stanmore to Uxbridge, taken and diverted by them.

Traverse, that the road and the footway to the same, so set out and made by the London and Birmingham Railway Company, on each side of the said bridge, *are not a good and sufficient road and footway, and as convenient for passengers and carriages*, as the said road and footway taken and diverted by the Company. And further, that the Company have not set out and made *a good and sufficient road*, together with footway and bridge, *as required by the acts of Parliament* in the writ mentioned, instead of the part of the said road leading from Stanmore to Uxbridge, taken and diverted by them. And further, that

the said Company *have extended the parapet walls of the said bridge, on each side, further than was absolutely necessary.*

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Sir *W. Follett* and *Channell*, for the defendants, claimed the right to begin—contending that the substance of the issue to be tried was, whether they were warranted by the act in the works they had made; that it was for the defendants to prove they had acted in conformity with the act; and that, consequently, the affirmative of the issue lay upon them.

Sir *J. Campbell*, Attorney-General, Sir *F. Pollock*, and *Hoggins*, for the Crown.—The defendants say they have extended the parapet walls as far as necessary, and no further. We say, they have done more than they are authorized to do,—therefore, the affirmative of the issue is on us.

LORD DENMAN, C. J., decided that the Counsel for the Crown should begin.

Sir *J. Campbell*, Attorney-General, stated the case, and in regard to the question, whether fifteen feet was to be understood to mean the maximum or minimum width of the bridge, cited the case of *R. v. The Regent's Canal Company* (a). The Canal Company were indicted and convicted under similar circumstances, for not making a bridge of the same width as the road had been,—Lord *Tenterden* there held, that it should have been *at least as wide as the road*.—This ruling was confirmed by this Court, which refused to grant a new trial.

Witnesses were called to prove the dimensions of the two roads and bridge,—they also spoke to the incon-

(a) Hilary or Easter, 1821.—Not yet reported.

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venience caused, particularly to persons driving sheep and cattle, by the narrowness of the substituted road.

Sir *W. Follett* addressed the jury for the defendants; and contended, that the road not on the bridge was as convenient to the public as the old road; and that the dimensions of the bridge were in conformity with the act. That no restriction was imposed upon the Company by the 8th section, which gave power to divert highways;—that the 67th section, applied to a temporary and not to a permanent diversion of road; and that it was evident that the act, in fixing the width of the bridge at fifteen feet, meant, that it should not be necessary to exceed that width in any case: and that the legislature could not have contemplated roads so narrow as fifteen feet, turnpike roads being necessarily thirty; parish roads twenty; and inclosure roads thirty feet wide:—and that if this road had not been diverted, but taken over the railway in the original line, the only provision in the statute that would have applied to it, was the section fixing the width at fifteen feet. He also relied on the decision of the Vice-Chancellor, in the case of *The Attorney-General, at the relation of Walton, v. The London and Southampton Railway Company (a)*, where the same point was raised,—who held, that he was bound by the terms of the act of Parliament, without regard to the public convenience, and could not compel the Company to make their bridge wider than fifteen feet; although, in that case, it was a turnpike road of great thoroughfare.

LORD DENMAN, C. J., to the jury.—There are three issues in this case, and I am of opinion, that you should find all three for the Crown. The first is, whether the defendants have made as good and sufficient a road in all respects as the old road; secondly,—whether they have

(a) Last Case.

made a good and sufficient road within the meaning of the act; thirdly,—whether they have extended the walls of the bridge further than they are authorized to do.

As to the first issue, it is my opinion, that every right of way that is rendered less convenient for passengers, under any circumstances, in the case of a driftway as well as any other, is the proper subject of this inquiry. That, although the Company may have made the new road better than before, in some respects in which the old road might have been made as convenient by proper care and attention; yet, if by making it narrower, it is in that respect less convenient to the public, the other advantages of the new road over the old should not be considered an equivalent. And it appears to me to be matter of necessity, that contracting a road makes it less convenient, and that the act intended to comprise passengers under all circumstances, with flocks and herds, as well as horses and carriages.

The second question involves issues both of law and fact; and upon that, I think the Company were not bound to make the bridge as wide as the road; for, in my judgment, the act of Parliament gave them full liberty to make the bridge only fifteen feet wide. That inconvenience the law contemplated, and we must submit to it; but then the Company contend that, in the word *bridge*, the act meant to include the approach to it on each side between the parapets. There, I think, they are wrong, and that they had no right to narrow the road one inch beyond the span of the bridge over the railway.

On the third question, I need scarcely ask your opinion, for, if they are allowed to extend their parapet walls to one hundred and fifty feet, I do not see what limit can be put to them. They were bound to make the road as wide as the old one, up to the very point where the bridge commences.

Verdict for the Crown on all three issues.

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*March 1st &
3rd, June 17th
& 23rd, August
30th.*

BETWEEN SIR JOHN SIMPSON, THE RIGHT HONOURABLE JAMES MEEK, Lord Mayor of the City of York; GEORGE HUDSON, and THOMAS BACKHOUSE, - - - Plaintiffs,
and
JOHN FRANCIS LORD HOWDEN, - - Defendant.

The projectors of a railway, applying for an act of Parliament to authorize the undertaking, entered into an agreement with the defendant, a Peer of the upper House of Parliament, through whose estates the intended railway would pass, and who was a dissident to the bill,—that, in consideration of the withdrawal of his opposition, they would, in the then

THE bill stated, that, in the year 1835, a Company was formed under the name of “The York and North Midland Railway Company,” for making a railway from the City of York to and into the township of Altofts, in the parish of Normanton, in the county of York, there to unite with another projected railway called The North Midland Railway, and for making certain branches from the said railway; and a great number of persons subscribed for and became proprietors of shares in the Company; and at the time of entering into the agreement hereinafter stated, the plaintiffs were subscribers for and proprietors of a considerable number of such shares.

That preparations were made in the year 1835 for applying to Parliament in the ensuing session for an act to incorporate the Company, and to give them compulsory powers of purchasing lands, and other powers for making

next session of Parliament, apply for and endeavour to obtain an act empowering them to make a certain deviation of their line; and that, in case the bill then pending in Parliament should pass into an act, the plaintiffs or the Company to be incorporated would pay to the defendant 5,000*l.*, as compensation for the detriment to his residence and estates from the passing of the railway according to the deviated line. The defendant, thereupon, withdrew his opposition to the bill then pending, and the same passed into an act.

The Company, subsequently, resolved to adopt a line differing both from the line authorized by the act, and from that pointed out by the agreement; and by which new line the lands of the defendant were altogether avoided.

The defendant having brought an action against the plaintiffs, upon the agreement, to recover the sum of 5,000*l.*—*Held*, by the Lord Chancellor, reversing a decision of the Master of the Rolls, that, where the illegality of an instrument, (if it be illegal), appears upon the face of the instrument itself, and is a question cognizable at law, there is no jurisdiction in a Court of Equity to order the instrument to be delivered up and cancelled; and that the circumstance of a question of construction arising upon the instrument, supposing it to be valid, afforded no ground for equitable interference, where that question could be dealt with as well at law as in equity.

the railway; and, in compliance with the Parliamentary regulations, the line of the intended railway was surveyed, and the maps or plans and sections of the line were, previously to the 30th of November, 1835, deposited in the respective offices of the clerks of the peace of the several counties and districts through which the intended line would pass.

That the defendant, a Peer of the upper House of Parliament, was and is the proprietor of lands through a portion of which the line of the intended railway was described as passing, and, when it became known to him that such was the proposed line, he, in the first instance, expressed no objection thereto, but only stipulated that the line should be made to pass in a particular direction; that such stipulation was complied with, and the defendant was or appeared to be satisfied with what was done, and he was privy to and gave some assistance to the survey of that portion of the line which passed through his lands. That some time afterwards the defendant, without any cause assigned, expressed himself to be opposed to the line of the railway, and requested that it should be entirely withdrawn from his lands, but such opposition was expressed at too late a period to enable the Company to survey a new line, and prepare and deposit the necessary maps, plans, and sections, within the time requisite for obtaining an Act of Parliament in the then ensuing session; and the Company were therefore obliged to proceed in their application to Parliament upon the line already surveyed. That, upon the bill for incorporating the Company, and giving to them the requisite powers for making the railway, being introduced into Parliament, the defendant presented a petition in opposition, wherein he, amongst other things, complained, that the line of the railway was injudiciously chosen, and unnecessarily injurious to his estate; and the Company, having reason to fear, that from his personal influence in the upper House of Parliament, his opposition

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would endanger the passing of the bill, were induced to enter into a treaty with him, for putting an end to such opposition, and, as a consideration for his desisting therefrom, the defendant required that the Company should endeavour to deviate the line of the railway, by carrying the same in the direction referred to in the agreement hereinafter stated, and that they should pay him the sum of 5,000*l.*, as a compensation for the damage and detriment which he alleged his estate would sustain from the railway, according to such deviated line; and should also make further compensation to him, as expressed in the said agreement, in the event of the deviated line not being ultimately adopted. That the Company were obliged to submit to the conditions so imposed upon them; and it was thereupon arranged, that the plaintiffs, as proprietors of shares in the Company, should individually enter into an agreement with the defendant for securing to him the performance of the said conditions.

That the plaintiffs, accordingly, became parties to and signed a memorandum of agreement, dated the 4th of May, 1836, and made between the defendant of the one part, and the plaintiffs of the other part; whereby, after reciting the formation of the Company, and that the plaintiffs were four of the proprietors of such Company, and also reciting that a bill had been introduced into Parliament for making such railway, the line whereof would, for a considerable extent, pass through the estates and near the mansion and residence of the defendant, who considered the same would be a great injury and detriment to his estates, and was, therefore, a dissentient from such undertaking, and would oppose the passing of the bill; and also reciting that the plaintiffs in their own individual capacities, and not merely as proprietors in the projected railway, had proposed to the defendant, that if he would withdraw his opposition to the bill, and assent to the railway, they would endeavour to deviate the line proposed in

the map or plan deposited for the purposes of the bill; and furthermore, that in case the bill then in Parliament should pass into a law in the then present session, the plaintiffs should be bound by the further stipulations and agreements thereafter contained: It was witnessed, and the defendant thereby agreed, on the condition of the stipulations and agreements thereafter contained being observed and performed, he would withdraw his opposition to the bill, and give his assent thereto; and the plaintiffs did jointly and severally agree with the defendant, that they would, during the then next session of Parliament, apply for and use their best endeavours to obtain an act to enable them to deviate their line, as proposed in the plan drawn in the margin of the memorandum of agreement; and furthermore, that in case the bill then in Parliament for making the railway should be passed into law within the then session, the plaintiffs or some or one of them, their or his respective heirs, executors, or administrators, some or one of them, or the Company, should, within six calendar months after the last-mentioned act should receive the royal assent, pay to the defendant, his executors, administrators, or assigns, as part of his personal estate, the sum of 5,000*l.* sterling, as or towards compensation for the damage and detriment which the residence and estates of the defendant would sustain from the railway passing according to such deviated line, and exclusive of and without prejudice to the further compensation to be made to the defendant, his heirs or assigns, in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation to him or them, or to his or their tenants, for any such damage and injury. And further that, in case the bill then in Parliament should in the then present session be passed for making the railway according to the then Parliamentary plan, the plaintiffs, or some or one of them, or the Company, should, in the then next session of Parliament,

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apply for, and use their best endeavours to obtain, an amended act for deviating the line of the railway, as proposed in the plan drawn in the margin of the memorandum of agreement; and in case the plaintiffs, or some or one of them, or the Company, could not obtain such an amended act during the then next session of Parliament, then the plaintiffs, or some or one of them, their heirs, executors, or administrators should, within three calendar months after the amended act should have passed, or in the event of such act not being obtained, within three months after the attempt to obtain such act should have failed, pay to the defendant, his executors, administrators, or assigns, such additional sum of money over and above the sum of 5,000*l.*, by way of compensation for damage therein mentioned; and also that the plaintiffs, or some or one of them, their or his heirs, executors, or administrators, some or one of them, or the Company, should previously to using or employing, for the purposes of the railway, any part of the lands of the defendant, his heirs, or assigns, pay a certain sum per acre, such payment to be made before the Company should take possession of the lands.

[Then followed a clause, providing for arbitration in assessing the amount of compensation to be paid to the defendant or his tenants.]

That, after such agreement had been so made and entered into, the defendant withdrew his opposition to the bill, and the same passed both Houses of Parliament; and on the 21st June, 1836, received the Royal Assent and became an Act of Parliament, under the title of “An Act for making a Railway from the City of York to and into the Township of Altofts, with various Branches of Railway, all in the West Riding of the County of York or County of the said City;” and by such act several persons therein named and referred to were incorporated by the name and style of “The York and North Midland Railway Company,” and the necessary powers were given for making and maintain-

ing the railway and the branch railways, and other works by the act authorized to be made; and amongst other provisions in the act, it was thereby required, that the whole of the sum of 370,000*l.*,—the probable expense of making the railway and the other works,—should be subscribed for in the manner therein mentioned, before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway should be put in force; and it was further provided, that, unless the Company should within the space of two years, to be computed from the passing of the act, agree for or cause to be valued and paid for as therein mentioned, the lands which they were by the act empowered to take or use, then the powers thereby granted to them for taking or using such land should cease and be utterly void, save and except with such consent as therein mentioned.

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That the line of the railway authorized by the act was the original line described in the maps or plans and sections deposited as aforesaid; but after the passing of the act, and before the Company had entered upon or taken any portion of the lands of the defendant, a new and more direct line of railway,—by which nearly three quarters of a mile in distance would be saved,—was recommended to them by their engineer, and they resolved to adopt the same as preferable to any other line, and a petition for leave to introduce a bill into Parliament to enable the Company to avail themselves of such new line in lieu of the original line, or the deviated line mentioned and referred to in the memorandum of agreement, was accordingly presented: That by the adoption of such new line in the construction of the railway, the Company will altogether avoid the lands of the defendant; and no damage or detriment therefrom will be sustained by any of the lands of the defendant as was contemplated at the time the agreement of the 4th day of May, 1836, was entered into. That the Company have been advised that the said agreement is against public policy and

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illegal, and that no demand can be sustained by either of the parties thereto against the other in respect thereof; and further, that if the agreement had been legal and valid, it was not the intention of the parties thereto that the defendant should be entitled to call upon the plaintiffs for the payment to him of the sum of 5,000*l.*, by the agreement stipulated to be paid as a compensation for the damage or detriment, which it was then supposed his lands would sustain from the line of railway passing through them, unless or until it should appear that some such damage or detriment, as aforesaid, would by that means be sustained.

That the defendant, although aware that a petition has been presented for leave to introduce such bill in the present session of Parliament, and that the new line of railway, thereby proposed, is the most direct and advantageous line, and that the same will not pass through any part of his lands, has commenced an action at law against the plaintiffs, to compel the payment of the sum of 5,000*l.*, insisting that he is entitled thereto, as a consideration for his having withdrawn his opposition to the bill for incorporating the Company, or that he is entitled thereto, as a compensation for the damage or detriment, which, under the powers in the act, if exercised by the Company, his lands may yet sustain.

The bill prayed, that it may be declared that the agreement entered into between the defendant and the plaintiffs, is against public policy, and that the same is void at law; and that the defendant may be decreed to deliver up the memorandum of agreement to the plaintiffs to be cancelled; and, in the meantime, that he may be restrained by the injunction of this Court from further proceeding in the action commenced by him, and from commencing or prosecuting any other action at law against the plaintiffs upon the said agreement, for enforcing the payment of the sum of 5,000*l.* And if it shall, for any reason, appear that the said agreement is consistent with public policy, and that

the same therefore is not void in law, and ought not to be delivered up to be cancelled; then that it may be declared that, according to the true intent and meaning of the said agreement, the sum of 5,000*l.* did not become payable to the defendant, except upon such portion of the lands as is described in the maps and plans deposited for the purposes of the act, or upon some part of the same being taken and used by the Railway Company, for the purposes of the railway, and as and by way of additional compensation over and above the purchase-money to be paid to the defendant for the damage or detriment which the lands of the defendant would thereby sustain; or that it may be declared that the condition and stipulation contained in the said agreement, for the payment of the sum of 5,000*l.*, upon any other construction thereof, was improperly required and obtained from the plaintiffs by the defendant; and that the defendant may be thereupon restrained by the injunction of this Court from proceeding in his action, or commencing or prosecuting any other action against the plaintiffs upon the said agreement for the payment of the sum of 5,000*l.* to the defendant, until some part of the lands of the defendant, described in the maps and plans deposited as aforesaid, shall have been taken and used by the Company, and for further relief.

To this bill the defendant demurred generally for want of equity.

Mr. *Treslove*, Mr. *Koe*, and Mr. *Bethell*, for the demurrer.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Wilbraham*, in support of the bill.

The substance of the arguments is stated in the judgment. The cases cited in support of the demurrer were, *The Vauxhall Bridge Company v. the Earl of Spencer*(a);

(a) 2 Madd. 356; Jacob, 64.

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 v. In support of the bill, *Allen v. Hearn* (c); *Hartley v.*
 LORD HOWDEN. *Rice* (d); and *Atherford v. Beard* (e), were referred to.

March 3rd,
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THE MASTER OF THE ROLLS.—[After stating the facts of the case and of the bill being demurred to.] In support of the demurrer it is argued, that the agreement is fair and legal; that the withdrawal of opposition to an act of Parliament of this sort is a good consideration for it; and that, during the solicitation for an act to authorize one line of railway, there is nothing against public policy in the agreement to promote that line at the same time that it is stipulated that the same parties should use their best endeavours to obtain an act for an altered line in the next ensuing session of Parliament. And further, it is argued that, if there be a doubt as to the agreement being illegal and against public policy, the question in that respect is proper to be tried in a court of law, and ought not to be withdrawn from the proper jurisdiction. It is further argued, that it does not yet appear whether the authority of Parliament can be obtained for any varied line of road; and, consequently, that the Company may yet be compelled to pursue the line sanctioned by the present act, and Lord Howden's land may accordingly be taken and used for the purposes of the railway; and, in that event, he will, in any view of the case, be entitled to compensation under the agreement, which, therefore, ought not to be delivered up to be cancelled.

Now, as a court of law has not the authority which this Court has to order a legal agreement to be delivered up to be cancelled; and as this Court has a jurisdiction which is constantly acted upon, and never doubted, to decide upon

(a) 7 Sim. 337; 1 Myl. & Cr. 640; 6 L. J. Rep. Chanc. N. S. 47, ante, 173.

(b) In Chancery not yet re-

ported.

(c) 1 Term R. 56.

(d) 2 H. Blacks. 43.

(e) 2 Term R. 610.

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a legal question which is involved in the title to the equitable relief which is sought; and as the Court, in case of any doubt or difficulty, has the means either of obtaining the assistance of a court of law, or of putting the matter in a course of trial, according to the forms and under the direction of the judges of the court of common law, it is obvious that I cannot allow this demurrer on the argument, that this is an attempt to change the jurisdiction. I must consider the legal question with reference to the prayer for relief, which asks that the agreement may be delivered up to be cancelled; and, in the consideration of such a question as this, I need not regard the fact, that the plaintiffs are partakers in the illegality, if illegality there be with the defendant, because, in such cases, depending on public policy, the Court does not give relief for the sake of the parties who complain, but for the sake of the public, and to avoid public injury.

The plaintiffs allege that the agreement is illegal and against public policy on these grounds:—They say that it was a fraud on the other landowners through whose ground the line of railway was intended to pass. Secondly,—that it was a fraud on the legislature by procuring an act of Parliament on the representation that one line of railway was the best and intended to be pursued, but which in fact was not intended to be adopted. Thirdly,—that it was an illegal act in Lord Howden, who, as a member of Parliament, had no right to make an agreement which necessarily placed his private interest in conflict with his duty as a legislator. It is said, and truly said, that every member of the legislature ought to preserve his judgment free, unbiassed, and uninterested, for the performance of his legislative duties; and it is argued that it is illegal to enter into an agreement which gave him a direct and immediate interest in the very subject in reference to which that duty is to be performed.

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I do not think it necessary for me to determine, on the present occasion, whether this agreement can properly be considered as a fraud on the landowners through whose ground the line of railway was to pass, on the considerations which were urged at the bar; or how far the character of the defendant, as a member of Parliament, precludes him, or can be considered to preclude him, from any right which persons not invested with that character might have to enter into such an agreement. Although it has been held, that the withdrawing opposition to a bill in Parliament may be a good consideration for the contract, it by no means follows that it should be so in this particular case; but I do not enter particularly into that question, because it appears to me that the second of the grounds alleged by the plaintiffs for considering this agreement invalid, is sufficient to enable me to decide this demurrer.

Acts of Parliament like that which has been obtained in the present case are laws by which private rights are to some, and often to a great extent, sacrificed for something which is alleged, and which is supposed to be a great, general, and public benefit. The land which a man considers as his own, and which it is for the general interest of the community that he should consider as his own, is, against his will, taken from him, and he is, against his will, compelled to take for it a consideration in money which he does not want; the ground and foundation of which is, that it is supposed a great and considerable public benefit is to be derived from that proceeding. The legislature judges of the private interest involved, and of the general and public benefit proposed to be obtained by the particular plan or scheme which is offered, and by hearing all persons whose private interests are concerned, or are conceived to be in opposition to the scheme; and the legislature can only come to a right conclusion by knowing correctly and distinctly what is the plan proposed, and who are the persons

whose property is to be affected by it. For this purpose notices are to be given, maps or plans are to be deposited, and parties are to be heard.

In this case Lord Howden, having opposed the bill, entered into an agreement to withdraw his opposition. By his consent he concurs with the promoters of the bill in representing the line of road delineated on the plan duly deposited, as the line which is to be adopted and acted upon. This representation must be considered to have had its effect on the minds of all persons interested, who had no opportunity of contemplating—no opportunity of considering any other line of road. They addressed themselves to this line only; their consent or their opposition regards this line only; the legislature proceeds and determines upon this line alone; and, in the meantime, whilst all other persons are contemplating this line, the promoters of the bill, with the sanction and concurrence of Lord Howden, and for his benefit, have contracted to use their best endeavours in a future session of Parliament to procure another bill to vary that line of road, in reference to which, and upon the faith of which, all other parties are proceeding.

In effect, the promoters of the bill and Lord Howden prevailed on the legislature to incorporate the Company, and to sanction a line of way in respect of which it was at the time intended to make, if they could, a considerable deviation; and the Company having gained the incorporation, and having the authority of the legislature to commence their operations, were, with that advantage, to use their best endeavours to procure another act for the varied line. I do not think it probable that the legislature, if they had the knowledge that the promoters of the bill had entered into that agreement, would have consented to pass it into a law.

It is true, as was argued, that the Company were not actually compelled to apply, and that they might not succeed in their application for the varied line; but, looking at the conduct of the parties,—to that which they stipulated to

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In order to form an opinion on the first point, it is necessary to analyze the contract.—It is an agreement, in the event of the bill then contemplated passing, and the railway thereby authorized being made, to pay to Lord Howden a certain sum as compensation for the damage which his property might sustain. Such an arrangement before bills of this description are proposed to Parliament is quite in the usual course of proceeding; and is, in fact, the ground of many of the assents given to the passing of such bills; in this there is nothing illegal, and the case was not argued on that ground. Then, with regard to the bill proposed to be introduced as a substitute for that first contemplated, namely, the bill for the varied line, the case is much the same. That was also an agreement for the damage which, in such case, Lord Howden might sustain; and in that, taken by itself, there would be nothing illegal; but the illegality is said to consist, not in providing for each of these alternatives, but in the provision that the proprietors of the first line, and those who were to advocate the bill for carrying it into effect, should use their best endeavours to procure an act for another line, and so defeat the plan proposed by the bill which they were seeking to have passed into a law. Now, having in contemplation an alteration in the line, it cannot be supposed that the Railway Company would have interfered with the land in the original line, but the expectation that the original line would be followed, might, undoubtedly, operate on the plans of individuals dealing with their own lands in that line; and the apparent certainty that their land would not be affected by the proposed railway, might operate on the plans of individuals in the neighbourhood dealing with their lands, and amongst others of those having land in the deviated line. If, however, a contract founded on the deviated line had not been entered into until after the first act had passed, the same inconvenience might have arisen to individuals, and yet no person could have supposed that such a contract made at

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that time would have been illegal. The illegality must, therefore, consist in this, that it operates as an inducement to persons applying to Parliament for certain powers not to use such powers, but to apply for other powers to carry the same operation into effect; and the argument, in short, must be, that it is contrary to public policy, and therefore illegal, that persons should apply to Parliament for a certain object, and for certain powers to carry that object into effect, intending, at a future period, to apply for other powers to effect the same purpose. From the opinion I have formed on the other point, and as the question of the legality of the contract is likely to come into question in another court, I abstain from pursuing this part of the case further.

The second objection to the bill is, that the illegality, if any, appearing on the face of the contract, is cognizable at law, and that equity ought not to interfere. This must depend on authority. It is alleged for the defendant, that there is no instance of a court of equity having entertained jurisdiction to order an instrument to be delivered up and cancelled on the ground of an illegality which appears on the face of the instrument itself; and in which case, therefore, there can be no danger that a lapse of time would operate to deprive the party to be charged with the means of defence. In *Coleman v. Sarrel* (a) a case is referred to in the argument, as having been recently decided by Lord Thurlow, in which he is stated to have held, that, where an instrument cannot be proceeded on at law, there is no ground to come into equity for relief; and his Lordship dismissed the bill in that case, which sought to have a deed delivered up, although, in another bill, seeking the performance of the provisions of that deed, he gave the parties the opportunity of trying the question of the illegal consideration at law.—In *Franco v. Bolton* (b) Lord Thurlow allowed a demurrer to a bill to set aside a bond alleged to have been given ‘*pro turpi causâ*’ after a verdict for the obligee,

(a) 3 B. C. C. 12; 1 Ves. J. 50.

(b) 3 Ves. 368.

although the illegality of the consideration did not appear on the face of the bond. In *Gray v. Matthias* (a), a bill was filed, to set aside a bond, which appeared on the face of it to have been given ‘*pro turpi causâ*.’ The question of jurisdiction on that ground was argued, and Chief Baron Macdonald, with the concurrence of the three other Barons, dismissed the bill with costs, not professing to decide the case on the question of jurisdiction, but doing what amounted to the same thing,—that is, on the ground that, in such a case, a court of equity ought not to interfere, and stating, that the plaintiff himself alleged that the instrument was a piece of waste paper, and on the face of it was good for nothing—that, whenever it was produced, it would appear to be void; and the plaintiff himself alleging that he had an irrefragable defence against it: this is a very distinct authority against the jurisdiction contended for by the plaintiffs. The cases upon the annuity acts of *Byne v. Vivian* (b); *Byne v. Potter* (c); *Bromley v. Holland* (d), do not appear to me to be applicable to the present case; for, in none of them did the circumstances appear on the face of the deed, which created the invalidity of the transaction; and in none of them were the objections confined to defects in the memorial, but depended upon evidence *dehors*, such as the mode of paying the consideration, of which the evidence might at a future time be lost. In the latter of these cases, Lord *Alvanley* expressed great doubts as to the jurisdiction, but he thought himself bound by the prior decisions. When the case came before Lord *Eldon*, he expressed a similar opinion as to the jurisdiction, but supported it in that case on the preceding authorities; and suggested that, by destroying the deed, and giving evidence of its contents, the variance between the deed and the memorial might no longer appear. He also referred to the

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(a) 5 Ves. 286.

(b) 5 Ves. 604.

(c) 5 Ves. 395—609.

(d) 5 Ves. 610; 7 Ves. 3.

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jurisdiction to deliver up bills and notes on a similar ground; that is, that the evidence might be lost; and says, —“there is considerable difference between the case of a bill of exchange, on which on the face of it there can be no demand, and an instrument which, on the face of it, purports to affect real property, that is to be applied in some measure to the case of a bill without a stamp;” and he again says, “I do not go to the length, that if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of a party who can make no use of it beneficial to himself.” In *Jervis v. White* (a), there are some observations of Lord *Eldon*’s which have been supposed to favour the jurisdiction contended for; but they must be taken with reference to the subject he was discussing; and the circumstances of the case (b) exhibit a case of gross fraud in the formation of the partnership, and, therefore, in the origin of the illegal obligation against which protection was sought by the bill. In that case, as it is stated, there could be no doubt of the jurisdiction of the Court. So, in *Ware v. Horewood* (c), the facts stated (d) amounted to gross fraud in the origin of the transaction.

Of the general jurisdiction of this Court, therefore, there can be no doubt; and Lord *Eldon*, in adverting to the general question of jurisdiction, so far from asserting it, as now contended for by the plaintiff, refers to a case in which the legal question arose incidentally, or in which the variety and multiplicity of suits which might be brought at law and equity furnish some equitable principle, of which the Court will take advantage, for the purpose of deciding, once for all, whether the securities be valid or not. In *Hayward v. Dimsdale* (e), a deed was impeached on the ground of oppression, because it was executed in contemplation of bank-

(a) 7 Ves. 415.

(d) 10 Ves. 200.

(b) Stated 6 Ves. 738.

(e) 17 Ves. 111.

(c) 14 Ves. 28.

ruptcy, and the sum stated in it was not what was really supposed to be due, but a sum taken as being equal to what was due, and therefore inserted as a security. No illegality appeared on the face of the deed, and many of the grounds on which it was impeached were purely equitable. The demurrer, therefore, was necessarily bad; and that case can have no application to the present. It is to be observed, also, that as to the two classes of cases referred to on this subject; namely,—cases relating to annuities and policies of insurance; the former class—bills to set aside annuities—not only depend on facts not appearing on the face of the instrument, but, except in those cases in which it gives authority to set aside an instrument, the statute always affords a very inadequate remedy; because the annuitant may repeat his action as often as the annuity becomes payable; and if the invalidity of the annuity be established, still, the consideration money would remain in hands which ought not to retain it; and, if the mode in which courts of equity deal with payments on account of the annuity as against the sum paid for it be correct, it raises a case of account, which a court of equity alone can properly deal with. It is not a mere declaration of the illegality of the instrument, but it involves the duty of restoring the parties, as nearly as possible, to the original situation,—a duty which a court of equity alone can effect. So with respect to the latter class,—cases on policies of insurance always represent transactions, which, if those would afford a defence to an action—yet, as proceeding on misrepresentation or fraudulent suppression, clearly give jurisdiction to courts of equity; and in these cases, also, the return of the premium would be to be arranged, if such cases were brought to a hearing; of which, however, there are but few precedents.

In *Jackman v. Mitchell* (a), Sir S. Romilly states, that

(a) 13 Ves. 585.

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there was no instance of a decree for delivering up a bond appearing on the face of it to be void; and he referred to the case of *Ryan v. Mackmath* (a). Lord *Eldon* did not controvert that proposition, but said that the question did not arise,—the instrument, in that case, being bad only as it might be proved *aliunde* to be so. In *Harrington v. Du Chatel* (b), referred to by Lord *Eldon*, in *Bromley v. Holland* (c), the illegality did not appear on the bond, and the corrupt contract was not between the obligor and the obligee; and, on a motion for an injunction, the Lord Chancellor expressed doubts, whether a court of law could relieve. In *Law v. Law* (d), the Lord Chancellor says, “It is agreed that the bond is good at law; and therefore the obligee is right in coming into equity.”

If, then, there be no case in which this jurisdiction has been exercised, and if I find Lord *Thurlow*, in the case referred to, of *Coleman v. Sarrel* (e), the Court of Exchequer in *Gray v. Matthias* (f), deciding against it; Lord *Alvanley*, in *Bromley v. Holland*, (g), regretting that the jurisdiction had been assumed in the case of annuities; and Lord *Eldon* in the same case (h) directly, and in the case of *Ware v. Horwood* (i), inferentially disclaiming the jurisdiction contended for; it only remains to be considered whether any such cogent reason exists in the present case as to make it my duty to assume the jurisdiction,—and so, for the first time, to establish a precedent for it. Now, I find no fact stated in this bill impeaching the legality of the instrument, beyond what appears on the face of the instrument itself. If there should be a decree for the plaintiffs, it would be merely to deliver it up,—no consequential

(a) 3 B. C. C. 15.

(b) 2 Swanst. 158, n.; and 1 B. C. C. 124; 2 Dick. 581.

(c) 5 Ves. 610; 7 Ves. 3.

(d) Ca. T. Talb. 140; 3 P. Will.

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(e) 1 Ves. J. 51; 3 B. C. C. 12.

(f) 5 Ves. 286.

(g) 5 Ves. 610.

(h) 7 Ves. 3.

(i) 10 Ves. 200; 14 Ves. 28.

relief,—no account to be taken,—no provision made for restoring the parties to their original situation.

Whether the defendant proceeds in the action he has brought, or brings another, the same questions must be raised and decided at law as are raised by the bill. Why, then, should a court of equity in this case assume to itself the decision of a mere legal question, contrary to its usual course of proceeding? Would it do so if a bill were filed to have a noted bill delivered up, drawn on an unstamped paper, or a wrong stamp? But what would be the consequence of retaining such a bill?—unless an injunction were granted, the action would proceed.—If the plaintiff at law recovered, it can hardly be supposed that this Court would postpone execution on its own opinion, on a point of law, after the court of law had decided in favour of the demand. That a party has not correctly availed himself of a defence at law, or that a court of law has erroneously decided a point of pure law, is no ground for equitable interference; and if the defendant at law obtains a verdict, and the illegality of the instrument is thereby established, the whole object of the plaintiffs in equity will be obtained. Is this, then, a case in which a court of equity will, by injunction, restrain further proceedings in the action, and take to itself exclusive jurisdiction over this legal question? I apprehend so far from it, that, even if the Court did entertain the jurisdiction, it would be anxious to put the case in such a course as would enable this Court to obtain the opinion of a court of law on a purely legal question; and, by permitting the action to proceed, it will afford to the parties the most speedy, cheap, and satisfactory manner of obtaining a decision on that question at law.

As to the point raised by the bill—whether, in the events which have happened, the plaintiffs in equity are liable to pay the 5,000*l.*, it is purely a question as to the con-

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struction of the instrument itself, which may be dealt with at law quite as well as in equity, and which can afford no ground for equitable interference.

In the absence, therefore, of any decision in favour of the jurisdiction contended for by the plaintiffs, and with the authorities against it to which I have referred; and seeing no benefit which can arise in this or in any other similar case, from this Court assuming the jurisdiction, I am of opinion, that this demurrer ought to be allowed (*a*).

(*a*) See the following Report of the proceedings at law.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

TRINITY VACATION.

Between THE RIGHT HON. JOHN FRANCIS

LORD HOWDEN - - - - - Plaintiff,

and

SIR JOHN SIMPSON, KNT. and Others - Defendants.

1839.

July 3rd.

THE declaration stated, that whereas heretofore, to wit, on the 4th of May, 1836, by a certain agreement then made between the plaintiff on the one part, and the defendants on the other part, which said agreement, sealed with the respective seals of the defendants, the plaintiff then brought into court, the date whereof was the day and year aforesaid. [The declaration then stated the agreement, which has been fully stated in the preceding case (*a*).]

That, although the plaintiff, in pursuance of the agreement, to wit, on the day and year aforesaid, withdrew his opposition to the bill, and the said bill during the then session of Parliament, to wit, on the 21st of June, 1836, did receive the royal assent, and did pass into a law, and,

(a) Ante, p. 328.

An agreement had been entered into between the plaintiff, a Peer of Parliament, and the defendants, projectors of a Railway Company; whereby, in consideration of the plaintiff's withdrawing his opposition to a bill then before the House of Lords, for authorizing the undertaking, the defendants contracted to pay to the plaintiff 5,000*l.*, and to endea-

vour to procure in the then next session of Parliament, an act to authorize a deviation from the then contemplated line. It was pleaded, that this agreement was void on three grounds: First,—because it had been concealed from the legislature: Secondly,—because concealed from the other landholders: and thirdly,—because the plaintiff being a Peer of Parliament, could not legally enter into a contract of that nature.

Held, by the Court of the Exchequer Chamber, reversing a judgment of the Court of Queen's Bench, that the agreement was valid, and that the plaintiff was not bound to communicate to the legislature the bargain he had made with the Company.

Held, also, by the Court of the Exchequer Chamber, that the plaintiff was not bound to communicate the agreement to the other landholders; and, that a member of the legislature could make any terms for the sale of his land, and compensation for injury to his comforts and property, which it is lawful for a private individual to make.

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although upwards of six months had elapsed since the bill received the royal assent and passed into a law as aforesaid, yet the defendants had not yet paid to the plaintiff the sum of 5,000*l.* above demanded, or any part thereof, &c.

Pleas (cravingoyer of agreement(a)), which agreement being read and heard, the defendants say that, after the making of the agreement, and before the commencement of this suit, to wit, on the 1st of February, 1837, the Company of Proprietors of the projected railway resolved to abandon, and did altogether abandon, the said deviated line, the direction of which is, in the agreement, mentioned to be shewn by the blue line in the reduced map or plan annexed to the agreement; and in lieu thereof did then resolve to adopt, and did then adopt, another line for their projected railway in lieu of the deviated line mentioned in the agreement, and eastward thereof; which newly adopted line, so being eastward of the deviated line in the agreement mentioned, entirely misses, and is altogether out of the lands, tenements, and hereditaments of the plaintiff, and every part thereof; and that they the Company, to wit, on the day and year aforesaid, presented a petition to the then Parliament of these realms, to be permitted to carry the projected railway along the newly adopted line; and were then making every exertion in their power to procure an act of Parliament for carrying the projected railway along the newly adopted line; and if they should succeed in obtaining the act, no part of the projected railway would pass through the lands, tenements, and hereditaments of the plaintiff, or any part thereof—(a verification). And for a further plea in this behalf, the defendants say, that the projected railway in the agreement mentioned, at the time of making the agreement, was intended to pass through, and, according to the act to which the royal assent was given, as in the declaration mentioned, and is

(a) *Ante*, p. 328.

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intended to pass through divers lands of divers individuals, and that the agreement was made and entered into privately and secretly between the parties thereto, and without the consent or knowledge of the individuals, through whose lands the railway was intended to pass as aforesaid, and was concealed from them continually until the act was passed, and that the agreement was not disclosed to, or known in or by the Parliament in and by which the act was so passed as aforesaid, and that the same agreement was concealed from the legislature during the passing of the act. And the defendants further say, that the plaintiff, before and at the time of making the agreement was, and from thence hitherto hath been, and still is, a peer of this realm *and a Lord of Parliament*(a).

Demurrer.—Because it does not appear by the first plea, whether the Company abandoned the deviated line in the agreement mentioned, before, or after the passing of the act of Parliament in the agreement and the declaration mentioned, and that the abandonment of the line in the agreement mentioned, affords no answer to the cause of action in the declaration mentioned; that the money stipulated to be paid by the defendants in the agreement is to be paid, at all events, within six months after the passing of the act. And that it is no answer in point of law, that after the agreement made, and the act passed, the Company thought fit to abandon the line, and that the first plea is in other respects uncertain, &c., and affords no answer, &c.; and that the second plea is not sufficient in law.—Joinder in demurrer.

Cresswell for the plaintiff.—In this case a bill was brought into Parliament prejudicial to Lord Howden. He opposed it, upon which this agreement was made; the

(a) The words in italics were inserted during the argument by consent. See next page.

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agreement contains no stipulation for the return of the 5,000*l.*, nor is there any condition precedent, except the passing of the act, to the payment of it. It was important for the Company to have their bill then passed, in order to give them a parliamentary power. Where a day certain is fixed for payment, the rule for ascertaining whether one thing is a condition precedent for the performance of another, is laid down in *Pordage v. Cole* (a) and in the authorities collected in the notes to that case.

As to the second plea:—It is to be observed that the averment at the end of it is, not that Lord Howden is a peer of Parliament, but a peer of the realm; he may be a Scotch or Irish peer, and, therefore, the averment is not sufficient.

[Lord DENMAN, C. J.—We must either take it that he is a peer of Parliament, or probably an application would be made, without any objection, to amend the plea:—The amendment was made by consent (b).

Then it is said, that this is a fraud upon the landowners and shareholders, and also upon the legislature; but see the case of *Edwards v. the Grand Junction Railway Company* (c), referring to the decision of Sir Thomas Plumer in the case of *the Vauxhall Bridge Company v. Earl Spencer* (d). Lastly, if a member of Parliament having an interest of this nature cannot contract to assent to, or dissent from such a bill, it amounts to this,—that no member of the legislature can be a member of a joint-stock company.

Sir *F. Pollock*, contrà.—This case is not within *Pordage v. Cole* (e), as the payment of the money is bound up with taking part of the plaintiff's land, and had reference to that supposition—here there is an abandonment altogether of the

(a) 1 Saund. R. 319. n.

ante, 173.

(b) See preceding page, n.

(d) 2 Maddock, 356.

(c) 1 Mylne & Cr. 2. 650, S. C.

(e) 1 Saund. R. 319. h.

land. It might have been an agreement to pay money for some act which afterwards turned out to be impossible—such as for an office which is afterwards abolished by Parliament, or where the party dies before entering upon the office.

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It is indifferent to the argument whether this is a public act, or a private bargain—if a public act, it is a fraud upon Parliament to insist before them on one line, and to be secretly stipulating for another. The argument is—not that the Company represented the original line to be the best line which could be adopted, but that they untruly represented it to be the line, which was intended to be adopted.

If this agreement had been known, it would probably have influenced the assents or dissents of the other landowners, and the same principle prevails as in an estate bill, in introducing which, it is always inquired whether all parties, however remotely interested, are acquainted with the terms, and have assented.

There are many contracts which a peer may not enter into, but which another person can. This we may infer from the case of *Jones v. Randall* (a), which was an action upon a wager, whether a decree of the Court of Chancery would or would not be reversed in the House of Lords. Courts of law have taken views of public policy on questions of wagers. It has been held, that a wager on the amount of the hop-duty was illegal, and so one upon the life of Napoleon Buonaparte, *Gilbert v. Sir Mark Sykes* (b), because it gave the individual an interest and motive contrary to his moral duty. Every subject has a right to the judgment of every peer upon all legislative enactments; and, admitting that a peer is not bound to vote according to his notion of public benefit, where it interferes with his private rights, yet he is not to make a money bargain to surrender that right. The judgment prayed against the plaintiff imputes to him no personal dishonour or corrupt mo-

(a) Coop. 17. 37.

(b) 16 East. 150.

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tive, but merely that attention to his private interests, which public policy declares to be inconsistent with the situation, in which the constitution of this country has placed him.

Lord DENMAN, C. J.—We do not think there is any thing in the argument to support the first plea, as it does not appear that Lord *Howden* was privy to the concealment. As to the second the *Court* will consider.

Cur. adv. vult.

In Hilary Term, 1839, Lord DENMAN, C. J., delivered judgment as follows.—This case comes before us in the shape of a demurrer to a plea. The declaration sets out so much of an agreement under the hands and seals of the parties, as shews that there was a bill introduced into Parliament for the purpose of making a certain railway, called the York and North Midland Railway, of which the defendants were proprietors; and that the line was intended to pass near the mansion and residence of the plaintiff; that the plaintiff conceiving that the railway would be a great detriment and injury to his estates, declared his intention to oppose the bill in Parliament. [His Lordship proceeded to state the agreement as set out in the declaration (*a*).] The declaration then avers the withdrawing of the plaintiff's opposition, and the passing of the bill through Parliament, and then it assigns the breach of agreement to pay the sum of 5,000*l*. To this declaration the defendants, after reciting the agreement, have pleaded in Oyer; and, it is said, that these pleas are bad, for reasons assigned in the course of the argument before us. The defendants first plead that, after the making of the agreement, and before the commencement of this suit, the Railway Company resolved to abandon, and did abandon the proposed deviated line, and adopted another, the direction of which is set forth, and which, it appears,

(*a*) Ante, p. 328.

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altogether avoids the plaintiff's estates. We have already, in the course of the arguments upon the case, expressed our opinion upon the first plea; but upon the second plea an important question arises, which would seem to void the plea on two several grounds. The second plea is, that, at the time of making the agreement, the said projected railway was intended to pass through the lands of divers individuals, and that the agreement was made, and entered into privately, and secretly by the parties thereto, without the consent or knowledge of the various parties through whose lands the Railway was to pass; and, secondly, that the agreement was not disclosed or known to the Parliament by whom the act was passed, but that it was concealed from the legislature during the passing of the said act; and, lastly, that whatever was the character of the agreement, as between the parties making it, and the public, whose interests were thereby in some degree affected, the plaintiff, at the time of making the agreement, was, and still is a peer of the realm, and, therefore, whatever license others might have, that circumstance made it at all events illegal for him to enter into such an agreement, and, as he might be called upon to vote upon the measure in his place in Parliament, he could not interfere in, or be a party to it. These pleas were demurred to by the plaintiff,—and it was contended that on neither of these grounds could the agreement be impeached. Whether such an agreement entered into under such circumstances, and by such parties, be of necessity invalid of itself, we are not now called upon to decide. A state of things may be imagined, in which, upon information obtained by the parties promoting the measure, after the first line had been applied for, it might be deemed just, as well as expedient, by the legislature, to substitute another line for it; but the question is, whether such a change can be made during the progress of the measure through Parliament, by any compact, secretly entered into, between the Railway Company and any influential opponent of the measure, to

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the detriment of the other opposing parties, or to the detriment of those who were assenting to the bill.

Now the line, for which the bill had passed, was known to all the parties interested, but any deviation would render fresh plans and fresh notices necessary. Had the proposed deviated line been introduced during the then session of Parliament, it could not, in the ordinary rules of the House, have received the Royal Assent during that session. Suppose this agreement had been stated to the legislature, would the bill have been allowed to pass through Parliament? On the contrary, probably the well known objection might prevail, and it might be urged—"You come here for powers to make a line of railway in a particular direction, of which all those whose interests may be affected beneficially, or otherwise, have had notice. You offer us evidence in support of the expediency and utility of the measure. You call witnesses before us to substantiate your claim to our legislation, and you desire us to find these positions proved, when it is clear from your own acts, and the agreement before us, that another line is intended to be adopted by you. If you are not in a condition to establish your case, with respect to the deviated line, upon which it is clear we are hereafter to be called upon to legislate, it is best to suspend all legislation upon the subject, until we have all the plans before us." Now, if the legislature had proceeded upon such grounds, (and it is clear to us that such is the view which a Parliamentary Committee would take of the subject,) it is obvious that the agreement should have been declared to Parliament, and that its concealment by the parties thereto is fatal in point of law, because the concealing that agreement might have made the decision of the legislature other than it was. The legislature must be considered to stand in the position of a judge applied to for his interference, and it was their duty to see, that in all bargains of this kind, the interests of the public were properly protected.

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It was essential, therefore, that nothing should be knowingly kept back, which would reasonably be expected to have any influence in determining the judgment of the legislature; their object being, so to frame that decision as to secure to the public the best terms, consistently with the advantages which the Company held out, and which warranted an interference with private property the right over which the act was to confer upon the parties applying. Viewing the question in this light, our opinion must certainly be, that the agreement, under the circumstances of its concealment from the legislature, cannot be enforced against the defendants. But it appears that this case has come for decision before a court of equity, and two other cases have been cited in the course of the arguments before us. It is necessary, therefore, to see how the point stands with regard to authority, so that we may avail ourselves of all the assistance which the opinions of other judges on similar cases may afford. The present defendants filed a bill in equity, praying that the agreement might be delivered up, to be cancelled, as being contrary to public policy. To that bill the present plaintiff, Lord Howden, demurred, for want of equity. In the argument before Lord *Langdale*, the same objections to the agreement were urged as we are now considering, and which are embodied in the second plea. On that occasion, Lord *Langdale* observed: [His Lordship here read the judgment of Lord *Langdale* from the commencement (a) to the words "but it by no means follows that it should be so in this case" (b).] So that, although Lord *Langdale* thought there were strong reasons for deciding, that the consideration for the agreement might be good, if it merely extended to the withdrawal of opposition to the bill, yet he over-ruled the demurrer. This decision was reversed on an appeal to the Lord Chancellor: not on the ground that he impeached the opinions.

(a) Ante, p. 334.

(b) Ante, p. 336, line 12.

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of the Master of the Rolls, as they bore upon the law and facts of the case: and it may be well to see what he says upon that point, and as to the legality of the contract:—
“Such an arrangement before bills of this description are proposed to Parliament is quite in the usual course of proceeding, and is, in fact, the ground of many of the assents given to the passing of such bills; in this there is nothing illegal, and the case was not argued on that ground. Then, with regard to the bill proposed to be introduced as a substitute for that first contemplated; namely, the bill for the varied line—the case is much the same. That was also an agreement for the damage which in such case Lord Howden might sustain, and in that, taken by itself, there would be nothing illegal; but the illegality is said to consist, not in providing for each of these alternatives, but, in the provision that the proprietors of the first line, and those who were to advocate the bill for carrying it into effect, should use their best endeavours to procure an act for another line, and so defeat the plan proposed by the bill, which they were seeking to have passed into a law.”

Now, the opinion of the Lord Chancellor upon that point, and also, as to how far the land of individuals interested in the original line, might be affected in value by such an understanding; and how far, on these grounds, the contract might be deemed illegal, and against public policy, coincide entirely with our view; nor do they in any way run counter to the judgment we are now pronouncing. He says—“If, however, the contract founded on the deviated line had not been entered into until after the first act had passed, the same inconvenience might have arisen to individuals: and yet no person could have supposed that such a contract made at that time would have been illegal. The illegality must, therefore, consist in this—that it operates as an inducement to persons applying to Parliament for certain powers, not to use such powers, but to apply for

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other powers to carry the same operation into effect, and the argument in short, must be, that it is contrary to public policy, and, therefore, illegal, that persons should apply to Parliament for a certain object, and for certain powers, to carry that object into effect, intending, at a future period, to apply for other powers to effect the same purpose." There is, in fact, no decision given by the Lord Chancellor upon this point of the case; because, a little farther on, he observes,—"As the opinion I have formed on the other point, and as the question of the legality of the contract is likely to come into question in another court, I abstain from pursuing this part of the case further." And then, after going over the facts of the case, and reviewing the authorities on the subject, the noble and learned lord, in a few words, set forth the ground upon which he dissents from the judgment pronounced by the Master of the Rolls, "Whether the defendant proceeds in the action he has brought, or brings another, the same questions must be raised, and decided at law, as are raised on the bill. Why then should a court of equity in this case assume to itself the decision of a merely legal question, contrary to its usual practice?" "In the absence, therefore, of any decision in favour of the jurisdiction contended for by the plaintiffs, and with the authorities against it to which I have referred, and seeing no benefit which can arise in that, or in any other similar case, from this court assuming the jurisdiction, I am of opinion that the demurrer ought to be allowed." Then it would appear, that the whole ground of difference, between the decision of the Master of the Rolls and the Lord Chancellor was this, that the former determined a question, which, the latter was of opinion, could not be determined by a court of equity under such circumstances. It was inferred, in the course of the argument, from some expressions in the Lord Chancellor's judgment, that the decision of the Master of the Rolls was not decisive; but there is nothing in the whole

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to warrant or authorize such an opinion. There were two other cases referred to, *The Vauxhall Bridge Company v. Earl Spencer*, which is reported in Maddock (a), and subsequently on appeal in Jacob's Reports (b). In that Case the decision was between two rival Companies, as to the compensation the one party was to afford the other. The Vauxhall Bridge Company introduced certain clauses into their bill, to compensate the trustees of the Battersea Bridge Company; but an objection having been taken to them on the second reading of the bill in the House of Lords, the bill was withdrawn. An agreement certainly was made by these clauses, to pay a sum of money, to be secured upon the tolls of the bridge, to the proprietors of Battersea Bridge, in lieu of an indemnity in another way; but these clauses were expunged, and the bill passed without them. There is some difference between the two cases, but they do not affect the grounds of Sir *Thomas Plumer's* decision in the latter: because, as he observed, the public and the legislature must have supposed, that the agreement between these parties, and the claim for compensation, upon which it had been founded, had been otherwise arranged, or given up; and that the money arising from the tolls, would be applied as the act directed, and not in discharge of any obligation of this sort: and above all, that the money would not have been secured by any secret agreement. He was clearly of opinion, that the legislature would have refused to pass the bill, if these compensation clauses had been retained, on the ground even that they might be too great a burden upon the undertaking, and subject the public to heavier tolls. Independently of this, the object of the agreement being to prevent opposition to a bill in Parliament, such an agreement was a fraud upon the legislature, and contrary to public policy. In this strong opinion, however, Sir *Thomas Plumer* did not decide upon the validity of the bonds. There was,

(a) 2 Madd. 356.

(b) Jac. 64.

subsequently, an appeal to Lord *Eldon*, who affirmed the decree, and in the course of his judgment, he made some remarks, in which it would seem, that he doubted the soundness of Sir *Thomas Plumer's* reasoning. It is remarkable however, that he did not advert to the fact of the concealment from the legislature, upon which Sir *Thomas Plumer* laid such great stress; and his Lordship's judgment supposed a state of things, when the bill was before the House of Lords for the second reading, very different from that admitted upon the bill. By the statements in the bill, it would appear, that several lords took objection to these compensation clauses in the bill, on the ground that they were contrary to public policy; and that the contract upon which they were founded, was in itself illegal: the objections taken were founded upon the principle, that such contracts were detrimental to the interests of the public, and would operate as a bar to the general improvement of the country. Lord *Eldon* seems to think, that these objections fell from a member of the Committee; but that they were not sanctioned by, or known to the House of Lords. With all the respect which we sincerely entertain for the decisions of so able and intelligent a judge, we are compelled to say, that this reasoning appears to us extremely inconclusive. His Lordship's observations with reference to this point are:—"It is argued that this is a fraud upon the legislature; but I think it would be going a great way to say so. For *non constat*, if pushed to the extent of taking the opinion of the House, that it might not have passed the bill in its former shape. It cannot be said, that the agreement was contrary to legislative policy, because one member of the committee makes an objection which is not sanctioned or known by the House at large. Indeed, such things are constantly done, and with the knowledge of the House." But if the House might have refused to pass it in that shape, *a priori* it is equally clear that the House was constituted the judge of how far the

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provisions of any bill submitted to it, were, or were not, within the line which has been marked out by the course of its legislative policy. And if the parties applying for the decision of the House, knowingly withheld material facts which must have influenced its decision, we are at a loss to know how it can be said, that this removes the imputation of fraud, or the objections on the score of public policy.

The other case cited was, that of *Edwards v. The Grand Junction Railway Company* (a). The facts of this case were these:—The line of the intended railway was to cross a certain turnpike-road, and the trustees of the road objected to the bill, and announced their intention to oppose its progress through Parliament. Subsequently to the intimation of this determination, clauses were introduced into the bill which were considered satisfactory by the turnpike trustees; and, upon the faith of these clauses, the opposing party agreed to waive further opposition. It was then asserted by the Railway Company, that the introduction of these clauses into the bill would occasion them a considerable expense; and it was proposed to enter into an agreement with the trustees to perform the stipulations in these clauses, to which the other party assented, and the bill was passed without them.

The question in that case was, whether the agreement was binding? and both the present *Vice-Chancellor* and *Chancellor*, before whom it came, held that it was. Both these learned judges were of opinion that the bill, as it had passed the legislature, contained nothing inconsistent with the stipulations in the agreement. That was their opinion upon the first point; and, secondly, that if the clauses had been inserted, the opposition of the trustees would have been equally withdrawn, and the only parties interested consenting, the bill, as a matter of course, would have passed. In that case, as the agreement between the parties

(a) 1 Myl. & Cr. 650. S. C. ante, 173.

was to effect the very thing which the clauses originally contemplated, and would have provided for, it was impossible for any person to say that the legislature had been imposed upon. This case cannot, therefore, be urged in support of the one under our consideration, inasmuch as it is not one in which the agreement and the provisions of the act are opposed to each other. It decides no more than this—that an agreement to make particular viaducts over a railway of not less than fifty feet wide, (the act of incorporation of which railway provided that no bridges or viaducts should be of less width than fifteen feet), might be binding. In the conclusion we come to, we feel that we are sanctioned by the decisions of Sir *Thomas Plumer* and Lord *Langdale*; nor has there been any decision the other way, so far as the authorities cited go, in any case presenting similar features. This view that we have taken of the concealment from Parliament, makes it unnecessary for us to inquire, how far it might have gone to invalidate the agreement, to have concealed it from the parties interested in giving their assent to the bill, on a different supposition from that which the parties in this case secretly agreed to make; and we also pass by the question of how far the circumstance of Lord Howden being a member of the legislature, rendered it illegal for him to enter into such an agreement; we are, however, rather disposed to think he may as well as any other individual;—for we know of no disqualification entailed upon members of either House, as such, for the protection of their private rights. But the objection on the ground of the concealment from Parliament, we think, must prevail—although we do not mean to say, that, so far as it might affect the interests of other individuals, the other point is not entitled to great weight. On the whole, therefore, we are of opinion that the second plea is good, and that our judgment must be for the defendants.

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Judgment for the defendants.

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Error being brought in the Exchequer Chamber on the judgment of the Court of Queen's Bench, the case was argued, June 18th, 1839, before *Tindal*, C. J.; *Vaughan*, *Bosanquet*, and *Erskine*, Js. ; *Parke*, *Gurney*, and *Maule*, Bs.

The plaintiff assigned as grounds of error, that the making of the agreement, in the second plea mentioned, privately, and without the knowledge of the other persons mentioned in the second plea, and concealing the same from the legislature, is no answer in point of law to the plaintiff's cause of action on the agreement.

The defendants in error contended that the last plea is good, inasmuch as it discloses matters which shew that the agreement, on which the declaration is founded, is illegal and contrary to public policy, and fraudulent both as against Parliament and the public, and also against the assentients to the original line of railway.

Cresswell for the plaintiff in error (the plaintiff below).—The objections to the second plea are, First,—That Lord Howden, as a peer of the realm and lord of Parliament, could not make any bargain as to a bill passing through Parliament. Now it is conceded that a private individual may do this, and it is impossible to sustain the plea, that a peer cannot make an agreement in relation to his own lands. Although it is not usual for a member to vote in a committee with respect to his own property, there is no reason why he should not vote upon the subject of a railway in which he has shares. If there were any objection to this, no proprietor of Bank or India Stock could vote upon any question affecting those securities; nor could any manufacturer upon the subject of fiscal duties. In this case the plaintiff did not undertake to vote for the measure: he had before expressed his dissent, as he had a right to do: that dissent he agrees to withdraw, and to give his assent, and nothing more.

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Another objection is, that it is a fraud upon the other landowners, as the agreement was made privately and secretly. It is an extraordinary proposition, that when a peer submits upon terms to have his comfort destroyed for public convenience, he should be obliged to publish the arrangement entered into to all the world. If he chooses to submit to the grievance of having the peace and comfort of his residence destroyed for the public benefit, is it necessary that he should consult all the landowners from the beginning to the end of the line? The plea does not state whether the other landowners assented or dissented; they may have all agreed. Whose duty was it to communicate the agreement? Lord Howden had no privity with these landowners; the Company had: if, therefore, the agreement with him could affect any arrangement with the others, it was the duty of the Company to inform them, but Lord Howden's interests ought not to be affected by their omitting to do so.

Thirdly,—it is objected that the contract was not made known to Parliament; the bargain was made with the Company, not with Parliament; the plaintiff was not bound to inform the Parliament of it, nor had he entered into any stipulation that it should be concealed. The Company obtain a line from Parliament, not meaning to use it if they can afterwards get a better; if that is a fraud, it is the fraud of the Company, and the plaintiff is not implicated in it. The question is,—is the agreement itself legal and valid? if so, how can the concealment, which is not provided for by the agreement, and does not arise out of it, make that agreement void? That such contracts may lawfully be made, appears from the case of *The Vauxhall Bridge Company v. Earl Spencer* (a). It is difficult to found decisions of law upon public policy, but no principle of public policy is more essential than that which permits any individual to dispose of his own property, without consulting his neighbour.

(a) 1 Jacob, 64.

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The consideration moving in this case is perfectly legal, as is also the agreement to withdraw opposition and to consent. [*Erskine, J.*—You consider it as an agreement to withdraw opposition as a private person, not as a peer?]

The bargain having been made, and full consideration received, suppose there was illegality in the contract, is there any in paying the plaintiff 5,000*l.*? The Company do not pay it to him for doing an illegal thing. The objection is at variance with the first principles of law. If a person, for a lawful consideration, agrees to do several things, some lawful and some unlawful, he is bound to perform the former though not the latter. This distinction is drawn in *Pigott's case* (a), *Norton v. Simmes* (b), *Mosdel v. Middleton* (c), and *Featherstone v. Hutchinson* (d), (where the considerations for the promise was part legal, and part illegal, namely, an inducement to do an illegal act to avoid a penalty). See also *Howe v. Synge* (e), *Kerrison v. Cole* (f), *Chesman v. Nainby* (g). [*Tindal, C. J.*—There is also a case of *Newman v. Newman* (h)]; and see *Catlin v. Bell* (i), and it has been held, where a question has arisen about goods intended to be smuggled, that, unless that intention was part of the contract, it was not thereby vitiated, *Hodgson v. Temple* (k). [*Bosanquet, J.*—It has been held to be sufficient if he can be affected with the knowledge of the illegality.] Yes, because there the legal part was tainted by the illegal. Here, however, the plaintiff is entitled to judgment. He did not contract either to conceal, or to make known the fact. It does not appear whether it was concealed, or declared; and, even if the knowledge of the fact was confined to the parties, still the plaintiff is entitled to recover in the present action.

(a) 11 Coke, 26.

(b) Hobart 13.

(c) 1 Vent. 237.

(d) Cro. Eliz. 199.

(e) 15 East 440.

(f) 8 East 230.

(g) 2 Ld. Raym. 1456.

(h) 4 M. & S. 66.

(i) 4 Camp. 183.

(k) 5 Taunt. 181; and see the cases collected in Chitty on Contracts, p. 537.

Addison, *contra*.—If the act agreed to be done is illegal, the contract is also illegal. Here the compensation is in respect of the future deviation of the line, which is contrary to the act, and to this the plaintiff was a party. The plea is pleaded after oyer of the agreement, and the whole must be taken together, which shews that it had reference to the line when deviated, and that all the stipulations were in favour of the plaintiff. It is not pretended that he could not contract as an individual; but he cannot sell his vote, and having done so for pecuniary consideration or otherwise, so as to influence him in the performance of his Parliamentary duties, it is an illegal contract. It is equally important, that the judgment of peers of Parliament, as that judgments of courts of justice should not be purchased. Therefore the question is, does this contract embrace the sale of a vote? Lord Howden agrees that he will assent; if after this he had voted against the bill, it would have been a breach of his contract. Every man has a right to sell his own, but not to enter into an arrangement jointly with others, and manage at the same time to take advantage of them. Parties assent on the supposition that all assenting are on the same terms, and *non constat*, that they would have agreed, if they had known Lord Howden was to have any advantage. Again, they assent according to the plan laid before them; when they have done this, they create an incumbrance on their lands, and cannot afterwards deal with them as previously they could, and that too without consideration and advantage; they agree to the original plan; they would have opposed it had they known of the intended deviation: but the Company, by establishing a footing, are much more formidable, as it is much easier to get a second act passed than an original one. Moreover, this is a fraud upon the other members of the Company. The agreement is, that they or the Company shall pay; this then is a misapplication of the funds, as they stipulate

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to appropriate the money of the Company to a purchase, which they had no right to make. Then all deviation from the authorized line being forbidden (by sect. 46), it was a fraud on Parliament to stipulate for deviating that line in the manner they secretly contemplated—*secret* here means *designedly secret*—and the same thing is adverted to in the report of *the Vauxhall Bridge Company v. Earl Spencer* (a) where Sir *T. Plumer* says—“Such an underhand agreement is a fraud upon the legislature.” In *Edwards v. the Grand Junction Railway Company* (b), an agreement was made with the trustees of a turnpike road, for a bridge of a different width from the one prescribed by the statute, but that statute did not restrain them from making the bridge wider; and a stipulation of that nature with the trustees was not inconsistent with the stipulations of the act, it was rather carrying out the principle of the act; but this is in direct contravention. Parties making an agreement with Parliament, who may be considered as trustees between the landowners and the public, have no right to conceal their intentions, for a man may not come at his right by wrong. Where the legal part of a contract is so mixed up with the illegal, that it cannot be extracted, the whole is vitiated. If the deviation is illegal, the contract for it is also illegal.

Cresswell in reply.—Lord Howden did not contract to give his assent to the deviated line. He agrees to assent to the bill then before Parliament, and the Company contract to get the act for a deviation; and, unless the Company had consented to give him remuneration, he might have succeeded in opposing them altogether. He was no party to any scheme with others, nor did he bargain for the misapplication of the funds. They affected to make a contract with him, for which he requires their indi-

(a) 2 Maddock, 356; 1 Jacob, 64. (b) 1 M. & Cr. 650; ante, p. 173.

vidual liability, as was the case in *The Vauxhall Bridge Company v. Earl Spencer* (a).

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TINDAL, C. J., now delivered the judgment of the Court.—In this case a writ of error had been brought on a judgment of the Court of Queen's Bench, on a demurrer to a plea. Lord Howden, the plaintiff below, brought an action against the defendants, upon a covenant contained in a deed, by which, after reciting that a bill had been introduced into Parliament for making a railway, intended to pass through the estates and near the mansion of the plaintiff, and which the plaintiff thought likely to be injurious thereto, and therefore he was a dissentient from the undertaking, and was about to oppose the passing of the said bill, the plaintiff agreed, on the condition of the stipulations in the agreement contained being performed, to withdraw his opposition to the bill, and assent to the railway; and the defendants, four of the proprietors of the intended railway, agreed, in case the said bill should be passed into a law within the then session of Parliament, to give £5000 to the plaintiff, towards compensation for the damage he would sustain, within six months after the passing of the act; and also agreed that they would, in the next session of Parliament, apply and use their best endeavours to obtain an amended act for making a deviation from the line of the railway in a particular direction. The deed contains many other stipulations not material to be adverted to, but it is to be observed that there is no one which expressly states, or from which it can be implied, that the agreement, or any part of it, was to be kept secret. The declaration on this deed alleges that the act passed, and that six months had since elapsed, and that the money was not paid.

(a) 1 Jacob, 64.

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The first plea states, that the Company of Proprietors had abandoned the proposed line, and in lieu thereof resolved to adopt another which entirely avoided the lands of the plaintiff, and had presented a petition to Parliament for, and were using efforts to obtain, an act of Parliament for carrying it into effect.

To this plea there was a demurrer, and the Court of Queen's Bench held the plea to be bad; and on the argument before us it was not insisted that it was a good plea. It is indeed beyond all question that this plea affords no answer to a covenant to pay the £5000 absolutely at the end of six months after the passing of the act.

Upon the second plea, to which there was also a demurrer, the Court of Queen's Bench gave judgment for the defendants. [His Lordship here stated the plea.]

The objections founded on this plea were threefold: First, that the deed was a fraud on the legislature; secondly, that it was a fraud on the proprietors of lands on the line of railway; and, thirdly, that it was void, because it was against the law that the plaintiff, a peer of Parliament, should make a bargain which placed his private interest in conflict with his public duty.

The Court of Queen's Bench decided that the deed was invalid on the first ground, and gave no opinion upon the other two; and, indeed, little reliance was placed on them in the course of the argument in this Court; and we are of opinion that no one of those objections ought to prevail, and that the judgment must be reversed.

The ground upon which the deed in question was contended to be a fraud on the legislature is this: that the plaintiff and the defendants were to be considered as having agreed together to represent to the legislature, the line of road described in the then pending bill, as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt, and act on another if obtained. This is the view which Lord *Langdale* inclined to

think might ultimately be taken of this transaction. It was argued that Lord Howden and the proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect and had a better in prospect. In either view of the case the supposed fraud consists in an intention to make a *false* representation to the legislature, by stating the object of the adventurers to be to carry one line into effect and concealing the design of applying for another. In both it is essential, in order to make the deed a fraud on the legislature, that the contract to apply for a new act should be intended by both parties to be kept secret from it. For if it was to be disclosed, the idea of an intended fraud upon Parliament is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact, kept secret from the legislature and all the world besides, by both parties; the quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it; and if there did not then exist the intention of deceiving the legislature, by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment.

This point appears to us to be clear; and, on looking carefully at the plea, we find there is no such intention on the part of the plaintiff or of the defendants, at the time of the making of the agreement, or any intention to make any untrue statement to the legislature. It is indeed alleged in the plea, that the agreement was secret and was kept secret; but it was quite consistent with every averment in the plea, that both parties may be innocent of any original fraudulent understanding that the transaction should be kept secret at the time the deed was executed. As the

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instrument is not upon the face of it fraudulent, as no intention of making any false representation or of concealing anything can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged; and no such facts are alleged. The subsequent concealment from the legislature might indeed have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence; it cannot be used to supply the want of such distinct averment. It is not necessary, therefore, to decide whether such an intention, if it existed, would have avoided the deed, and if averred in the plea, would have made it a sufficient answer to the declaration. Now, this defect in the plea does not appear, so far as we know, to have been distinctly brought to the attention of the Court of Queen's Bench, and the judgment pronounced by that Court seems to have proceeded upon an assumption of the intention of both parties to keep the whole transaction secret.

The same observation disposes altogether of the objection to the deed, on the ground that it was a fraud on the landowners. It is suggested to be a fraud, either on the ground, that if the fact of Lord Howden having obtained apparently so large a compensation had been disclosed to the landowners, it would have induced them to insist on better terms for themselves; or on the ground, that if the intention not to act upon the powers given by the statute had been known to them, they might have made a different disposition of their lands. But, on either view, the intention to keep either one branch of the agreement or the other a secret from the landowners, is essential to make the deed fraudulent, and no such intention is averred. If such an intention had ever existed, there would still be a difficulty in holding that the deed would be fraudulent, on the ground that the supposed

goodness of the bargain was intended to be concealed; for it would seem that each landowner might lawfully make the best agreement he could for himself with any Company of Proprietors, just in the same manner as if a private individual for any purpose of his own were negotiating to purchase the land of the same persons. There is no common obligation on all the different proprietors to place themselves on the same footing as there is in the case of a general composition with creditors, in which case there is sometimes an express, and generally an implied, agreement, that all, or all who are not expressly excepted, shall share equally and derive an equal benefit from the estate of the insolvent. It is that agreement or understanding alone which imposes an obligation on each creditor to be in the same situation as another, and there seems no analogy between their situation and that of unconnected landowners. The last objection is that the deed was illegal, as it places the private interests and the public duty of the plaintiff, as a peer of Parliament, in opposition to each other. We can have no hesitation in saying, that, if it were averred in the plea, and proved that the sum of £5000, or any part of it, was really paid as a consideration for Lord Howden's giving his vote for or withholding his vote against the bill, and that the statement in the deed was in this respect a mere colour to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and illegal, and, consequently, void, and that no action would lie for any part of the money. But illegality is not to be presumed; it is to be alleged and proved where it does not appear on the face of the instrument itself.

Though Lord Howden was a peer, that would not affect his right to make any bargain for the sale of his land or for a compensation for an injury to it; if it did, a peer or member of Parliament would be placed in a worse condition than any private individual. We must presume, as

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there is no averment to the contrary, that his quality as a peer in no way affected the bargain in question; and that he was left, notwithstanding that agreement, to exercise his free judgment, and give or withhold his vote, according to his conscience, upon the measure when it came before him in his legislative capacity. In the absence of any agreement or understanding that the vote should be given in a particular way, the then tendency or possible effect of such a contract on the vote of a member of either house cannot be taken into consideration. We are, therefore, of opinion, that no one of the objections urged by the defendants in error can prevail; that the pleas of the defendants cannot be supported in law; and that the judgment of the Court below must be reversed.



Judgment reversed.

Between GEORGE STONE, BENJAMIN SEWELL,
and GEORGE GIBSON, Assignees of CHRIS-
TOPHER RICHARDSON, a Bankrupt, - Plaintiffs,
and
THE COMMERCIAL RAILWAY COMPANY, - Defendants.

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April, 10th.

THE bill stated, that by an act of Parliament made in the 6th and 7th years of the reign of William the Fourth, intituled “An act for making a railway from the Minories to Black-wall, with branches, to be called ‘The Commercial Railway;’” it was enacted, that the several persons therein named, should be a body corporate by the name and style of “The Commercial Railway Company,” and by that name might sue and be sued. That by the 2nd section of the act, it was enacted (among other things), that where the

The 9th section of the Commercial Railway Act, empowered the Company to enter upon, and take for the purposes of their undertaking, property therein described, not being houses, buildings, yards, or gardens.

The 14th section provided, that at the expiration of fourteen days, after notice given by the Company of their intention to take lands, the owner thereof should deliver to the Company, a statement of the particulars of his claim in respect thereof.

The 22nd section, provided for the impanelling of juries, to assess the value of lands after such notice, in case of no agreement being come to between the owner and the Company.

The 45th section, enacted, that the Company should not be authorized to take any house or other building, or any ground set apart, and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk or avenue, planted as an ornament or shelter to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, other than such as are specified in the schedule.

The 50th section enacted, that in cases of application by the Company for any part of any house, garden, yard, warehouse, building or manufactory, in the actual occupation of one person or several persons jointly, and twenty-one days’ notice to that effect given to the Company, they should not be empowered to take or use less than the whole of such house, garden, yard, &c.

In the schedule to the act, a bonded timber yard of three acres in extent, containing certain detached sheds and buildings thereon, was inserted under the description of “Timber Yard.”

Held, by the Vice-Chancellor, and by the Lord Chancellor on appeal, that the Company had no power under the 22nd section, to summon a jury to assess the value of lands, as to which they had given no previous requisition to treat under the 14th section.

Held, by the Lord Chancellor, that the notice to treat under the 14th section, constituted the relative situations of vendor and purchaser, as between the Company and the landowner; and that the Company had no power, under the 22nd section, to summon a jury to assess the value of a less quantity of land than that for which they had previously given notice to treat.

Held, by the Vice-Chancellor, that the premises in question did not constitute a yard within the meaning of the 50th section.

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word 'lands' should be used, the same should be understood to include tenements and hereditaments. That, by the 9th section it was enacted, that for the purposes, and subject to the provisions and restrictions of the act, the Company should be empowered to enter upon the lands of any person, and to survey and take levels of the same, or any part thereof, and to set out and appropriate for the purposes of the act, such parts thereof as they were empowered to take or use, and in or upon such lands, or any lands adjoining, not being houses, buildings, yards, or gardens, to bore, dig, cut, embank, and sough. [The remainder of the clause was in the usual form, enabling a Railway Company to take land for the purposes of their undertaking.] That, by the 20th section, after authorizing the Company to treat and agree for the purchase of lands, it was enacted, that at the expiration of fourteen days next, after notice in writing from the Company, or their agent duly authorized, of their intention to take or use any lands, or any part thereof for the purposes of the act, should have been given to any person or corporation seised, possessed of, or interested in, or authorized to accept satisfaction and compensation for the value of the same, or any estate, share, or interest therein, or for any injury or damage sustained, such person or corporation should deliver at the office of the Company a statement in writing of the particulars of the estate or interest, which he or they claimed to receive compensation for, and of the injury or damage sustained by him or them, and of the amount of the sum of money which he or they might expect, and be willing to receive in satisfaction and compensation for the value of such estate, share, interest, or charge, and for such damage or injury, respectively. [The bill then stated the 22nd section, for the impanelling of juries in cases of no agreement being made for compensation for damages, or for the purchase of lands.]

That, by the 42nd section it was enacted, that upon

payment of such sums of money as should have been agreed upon between the parties, or awarded by a jury for the purchase of any lands, rent, or other charge, or as a compensation for any loss or injury as aforesaid, to the parties interested or entitled, within three calendar months, or if the parties interested and entitled should refuse to receive such money as aforesaid, (and in other cases), then upon payment thereof into the Bank of England in manner therein mentioned, it should be lawful for the Company immediately to enter upon such lands, and thereupon such lands, and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of all parties therein, should thenceforth be vested in, and become the sole property of the Company, to and for the purposes of the act; and such payment, or tender, or conveyance, or such deposit in the Bank of England as therein mentioned, should operate to merge all outstanding or other terms of years, and to bar and destroy all dower, and all estates tail, and other estates whatsoever; provided nevertheless, that before such payment or deposit into the Bank as aforesaid, it should not be lawful for the Company, or for any person acting under their authority, to enter upon any such lands. That, by the 45th section it was enacted, that nothing in the act contained should authorize the Company, or any person acting under their authority, to take, injure or damage, for the purposes of the act, any house or other building, which was erected or built, on or before the 30th of November, 1835, or any ground which was then set apart, and used as, and for a garden, orchard, yard, park, paddock, plantation, planted walk, or avenue to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, other than and except such as are specified in the schedule to the act annexed, without the consent in writing of the owner and occupier thereof

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respectively, (unless in certain cases of omission, to be certified as therein mentioned).

That, by the 50th section it was enacted, that if any person or corporation by the act authorized, to sell and convey any lands, shall be applied to by or on behalf of the Company, to treat for, sell, dispose of, or convey any part of any house, garden, yard, warehouse, building or manufactory, in the actual occupation of one person, or of several persons jointly, and shall, by notice in writing to be left with the secretary or clerk of the Company, within twenty-one days after such application, signify his inclination or desire to treat for, sell, dispose of, and convey the whole of such house, garden, yard, warehouse, building or manufactory, and if it shall happen, that the Company shall not think proper or be willing to purchase the whole of such house, garden, yard, warehouse, building or manufactory, then, and in every such case, nothing in this act contained, shall extend or be construed to extend, to compel such person or corporation interested therein, to treat for, sell, dispose of, or convey, or to authorize the Company to take or use, part only or less than the whole of such house, garden, yard, warehouse, building or manufactory.

That a schedule was annexed to the act, purporting to contain a description of, and the names of the owners, lessees, and occupiers of the property through which the railway would pass.

That, in and for some time before the year, 1823, C. Richardson and his father, were the occupiers of, and carried on the business of timber-merchants, upon a large piece of ground, dwelling-house, wharfs, docks or ponds, and other hereditaments of very considerable extent and value, situate upon the south side of the Commercial Road, in the parish of St. Ann, Limehouse, and lying near, and partly contiguous to the river Lea, and also near to a dock or basin in the Regent's Canal, and at a short distance from

the river Thames. That the aforesaid premises then belonged to the father of C. Richardson, in fee, and were called "Richardson's Wharf;" part thereof having for many years before the year 1819, been used for landing foreign goods and merchandize, and enjoyed the privileges of a sufferance wharf, but which privileges ceased to be renewed in the year 1819.

That, in the year 1823, it was conceived, that part of the premises might be advantageously converted into a yard for bonding foreign timber and wood; and, accordingly, a petition for that purpose was signed by several merchants, and was presented to the lords Commissioners of the Treasury, of his Majesty George the Fourth. That the Secretary of the Treasury informed C. Richardson and his father, that their petition was granted; and they, together with two sureties, in July, 1824, executed the usual bond to his Majesty, and such bond, after reciting that the premises called Richardson's Wharf, had been conditionally approved of by the Commissioners of Customs for the deposit of wood which might be imported into the port of London, was conditioned in the usual manner. That, after obtaining such privilege, part of the said ground and premises were appropriated for, and converted into, and have since been used as, a yard for bonding timber and wood, and several thousand pounds laid out in building and making the walls, and fence, and the sheds, and sawpits hereinafter mentioned, and which are necessary and usual in yards of a similar description. That the ground so appropriated,—with the exception of a portion thereof adjoining the docks or ponds, which is on the South side of the yard and between it and the river Lea,—is surrounded and enclosed by high and substantial brick walls; and the remainder thereof, or the portion adjoining the docks or ponds, is secured and enclosed partly by the back of a shed within the yard, and partly by a high wooden fence; and there are several gates to the yard, for the egress and ingress of

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the timber and wood, and such gates are under the Queen's locks, and are opened and closed at fixed hours every day, with certain exceptions, and the keys of such locks are now kept by an officer of her Majesty's Customs. That, within the yard, there are several sheds for stowing and protecting the deal planks lodged in the yard, and also two buildings containing several sawpits for sawing and cutting up such of the timber and wood as is intended for exportation into planks, boards, and other forms, in which operation, as many as forty men are frequently employed. That, after the bonding yard had been formed, C. Richardson and his father carried on their business of timber-merchants on the remainder of the premises called Richardson's Wharf. That, in 1830, two floors of a building, at some distance from the bonding-yard, and at the opposite end of a wharf, between the yard and warehouse, and forming other part of the premises, was approved of by the Commissioners of Customs as a warehouse for bonding foreign corn, and in the year 1831, the privilege of receiving wood was extended to iron and steel, when forming parts of the cargoes of vessels laden with wood, and in the year 1833, the docks or ponds were approved of by the Commissioners of Customs as a proper place for the deposit of imported timber, and on those occasions bonds, similar to that aforesaid, were executed. [The bill then stated the death of the father of C. Richardson, whereby the latter became entitled to the business and premises, the bankruptcy of C. Richardson, and the transfer of his estate to the plaintiffs.]

That the privilege of bonding timber and wood in the yard, and the business and profits resulting therefrom, are of considerable value, and render the bonding-yard, in its present state, a very valuable property; and in consequence of an application of the plaintiffs to the Commissioners of Customs, stating the appointment of F. G. Richardson, as occupier of the bonding-yard, ponds, and warehouse, the usual bond was executed, which, after reciting that

F. G. Richardson was the occupier of a bonding-yard, also docks or ponds, and a warehouse, the whole situate at Richardson's Wharf, Limehouse, was conditioned for the due exportation of or payment of Custom duties, on all such goods and merchandize as were then, or might thereafter, from time to time, be lodged in such bonding-yard, docks, ponds, and warehouse. That, the plaintiffs have ever since the bankruptcy continued in the enjoyment of such privileges, and used the yard for bonding timber and wood, and by means of their agent F. G. Richardson, have ever since carried on the said business.

That, the timber or bonding-yard is mentioned in the schedule annexed to the act of Parliament, and is the yard which, in such schedule, is described as a "Timber Yard, of which C. Richardson was then owner and occupier." That, some time before the month of August, 1838, the Company set out the line of the railway, and on the 1st of August, 1838, the plaintiffs' solicitors received a notice in writing from the Company, signed by W. Routh, the Chairman, dated the 31st July, as follows. [The bill set out the notice, which was in the form prescribed by the 20th section, requiring the plaintiffs, within fourteen days from the date thereof, to treat with the Company for the land delineated in a plan accompanying the notice.] That in the plan referred to it is stated, that the part coloured red shews that which is required for the purpose of the railway, and in such plan the timber or bonding-yard is numbered 82, and is described as a timber-yard, and the part coloured red, includes part of the last-mentioned yard, and also divers other premises adjoining or near thereto, now belonging to the plaintiffs. That, on the 2nd of August, 1838, the plaintiffs' solicitors sent a letter to W. Routh, stating, that they had directed a survey to be made of the property which the notice proposed to affect, and that it would be impossible to deliver the required state-

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ment within fourteen days. [The bill then stated the exact direction, in which, according to the plan, the railway proposed to pass through the yard, and thereby sever it into two portions], and that it would leave a small part or one portion on the north side, while the remaining portion, with the exception of what would be occupied by the railway itself, would be left on the south side. That, the aforesaid notice was given in pursuance of the 20th section of the act, and was not an application to the plaintiffs, to treat for, sell, dispose or convey any part of the premises, pursuant to the 50th section; but that it appeared to the plaintiffs' solicitors, that a division of the yard in the manner proposed, would necessarily determine the privilege of bonding timber, and would, if a renewal of the privilege were obtained, necessarily diminish and injure the value of the yard, and that it would be for the interest of the plaintiffs, if they could be called upon to sell any part of the yard, not to sell less than the whole, and in consequence such solicitors conceived it would be proper to give notice of the intention of the plaintiffs respecting the yard to the Company, and they accordingly, and although they were advised that it was not necessary for them to do so, and although one of the Company's solicitors had on the 22nd day of August, 1838, told the plaintiffs' solicitors that they might have any further time that was reasonable to give such notice, signed and left with the secretary or clerk of the Company, by leaving the same at the office of the Company, on the 22nd of August, a notice in writing, which was afterwards received by the secretary or clerk, and was as follows. [The notice after stating, that the severance of the yard would render the residues thereof, and also the buildings thereon, useless for the purpose of bonding timber, required the Company to treat for the purchase of the whole thereof.] That, on the 12th of September, 1838, the solicitors of the Company wrote in answer to such last notice, a letter to the plaintiffs' solicitors, as follows. [The

letter stated, that the directors of the Company were advised, that from the smallness of the portion of the property required for the railway, it was impossible that the residue should be rendered useless; that they were advised that they were not compellable to purchase the whole of the premises, and that should a negotiation for the sale of the portion required by them be declined, the question of value must be decided by a jury. The bill then stated certain communications between the respective solicitors of the parties, not leading to any arrangement.]

That, on the 1st of February, 1839, the plaintiffs' solicitors were served by the Company with the copy of a warrant or precept, purporting to have been sealed with the common seal of the Company, and to have been directed to the sheriff of Middlesex, and which is as follows. [The bill set forth a precept for impanelling a jury, under the 22nd section.] That, the premises coloured red on the plan, indorsed on such last-mentioned notice or precept, and represented as part of a bonding wharf and yard, are, in fact, part of the said timber or bonding-yard, and include not only so much of the yard as will be traversed or occupied by the railway, and which was mentioned in the notice, dated the 31st of July, 1838, but also that portion of it which will be left on the north side of the railway. That it appears, from an inspection of the map or plan deposited with the clerk of the peace, and the fact is, that the line of the railway, as marked out in such map or plan, would not have passed through the bonding or timber-yard, although the plaintiffs have reason to believe that the deviation in that respect is authorized by the act.

The bill charged, that the Company are exceeding the powers vested in them by the act, and transgressing the provisions, and acting contrary to the true intent and meaning thereof. That, having regard to the provisions of the act, and in particular to the 50th section, the plaintiffs are not compellable to treat for, sell, dispose of, or

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convey, and the Company are not authorized to take, or use part only, or less than the whole of such timber or bonding-yard. That, the plaintiffs are by their agent in the sole and actual occupation of the yard. That the Company intend to proceed on the warrant or precept, and upon the assessment of the value of the land by a jury, immediately to pay the money awarded into the Bank of England, and forthwith to enter upon and take possession of the land mentioned in the precept, and to cut up and remove the soil thereof, although a considerable quantity of timber and wood is now lying thereon, and to abate and destroy all or a considerable part of the walls of the yard, which now stand to the north of the southern line of the railway. That all the aforesaid proceedings on the part of the Company will be completed, long before there can be either the means or opportunity of trying the above questions in any court of law. That, the proceedings of the Company will not only greatly damage, and, in fact, destroy the property of the plaintiffs, but will determine and put an end to the privilege of bonding timber and wood, and will expose the timber and wood in the yard to serious risk and injury, against which the plaintiffs will be bound to indemnify the owners.

The bill prayed, that it may be declared by this Court, that according to the true construction of the act of Parliament, the plaintiffs are not bound or compellable to treat for, sell, dispose of, or convey, and that the Commercial Railway Company are not authorized to take or use, under the provisions of the act, part only or less than the whole of the said timber or bonding-yard, and that, if necessary, an action or issue or a case may be brought or directed to a court of law, for the purpose of ascertaining the true construction of such act, and that the Commercial Railway Company, their agents, servants, and workmen, may be restrained, by the order and injunction of this Court, from all further proceedings on the said warrant or precept,

issued by them as aforesaid; and from issuing and proceeding upon any other warrant or precept, for a similar purpose, and from entering upon or taking possession of the land, mentioned or referred to in the warrant or precept, issued by them as aforesaid, or any part thereof; and from cutting up and removing the soil of such land or any part thereof, and from abating and destroying any part of the walls of the said timber or bonding-yard, and from committing or doing any other waste, spoil, or damage in or upon the said yard or any part thereof. And for further relief.

The following clauses of the act, were commented on in the argument:—

The 46th section, enacting that the land to be taken for the line of the railway, shall not exceed twenty-five yards in breadth, except in certain specified cases applicable to stations and buildings for permanent purposes of the railway, unless with the previous consent of the owners and occupiers of any lands. The 47th section, enacting that the Company shall be authorized to deviate from the line delineated on the maps or plans deposited with the clerks of the peace, with such alteration in the section as may be necessary in consequence thereof: provided, that no such deviation shall extend to a greater distance than one hundred yards, and, in passing through lands covered with houses, shall not extend to a greater distance than ten yards from the line so delineated, nor extend into the lands or property of any person whose name is not mentioned in the book of reference, unless the name of such person shall have been omitted by mistake. The 190th section, enacting that in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ or other proceeding, at law or in equity, upon the Company, personal service thereof upon their secretary or clerk, or delivering the same to some inmate at such office of the

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Company, or at the last or usual place of abode of such secretary or clerk, or in case the same, respectively, shall not be found or known, then personal service thereof upon any other agent of, or officer employed by the Company, or on any one director of the Company, or delivering the same to some inmate of the last or usual place of abode of such agent, officer, or director, shall be deemed good and sufficient service of the same respectively on the Company.

The plaintiffs gave notice of a motion for an injunction, in the terms of the prayer of the bill.

Mr. *K. Bruce*, Mr. *Wigram*, and Mr. *Walker*, in support of the motion.

The material question is, whether the Company are or are not legally compellable to purchase the whole of the yard in question?

The 9th section first introduces certain subject-matters of exemption, from the compulsory operation of the act, and the things exempted, are "houses, buildings, yards or gardens." The 45th section extends the exemption to any "yard" not mentioned in the schedule, and the 50th enacts, that with regard to any one of the matters, which being inserted in the schedule, are deprived of the previous exemption, the Company shall not be authorized to take any less part than the whole, if required to do so by due notice.

The question then arises, whether the property in question is or is not a "yard?" The definition given in Bailey's Dictionary of the word "yard," is "an enclosed space of ground, set apart for a particular purpose"; this property is clearly proved to be an enclosed space of ground, set apart for a specific purpose, and consequently is within the definition. The Company in the act, or parliamentary contract, between themselves and the public, have adopted

this very description, and have inserted it in the schedule as a "yard" (a). The language of the bond of July, 1824, shews, that the Government consider the place in question to constitute a yard. Even if it be not a "yard," it is a warehouse, and, under that denomination, is privileged.

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Courts of law hold these acts of Parliament to be contracts between the public and the Company, and construe them strictly as against the latter (b).

Although maps describing the line of the railway are deposited with the clerks of the peace for the different counties and towns, and notwithstanding the usual power of deviating, a plan of the lands required by the Company, is invariably annexed to the notice of the intention of the Company to take land, and requiring the owner to treat for the sale thereof. An accurate and precise description is most material, considering that the owner is required within fourteen days to deliver a statement in writing of the amount which he is willing to receive in satisfaction and compensation for the value of the land required. The circumstance of a particular portion, however minute, of the property, the subject of treaty, being to be taken or not, may, in the estimation of the owner, make all the difference as to the value to be affixed, and he ought not to be compelled to call in the aid of a surveyor, to ascertain whether that portion will be taken or not. When the parties are going before a jury, an accurate description, and the exact dimensions and admeasurements, according to a specified scale, are always annexed to the notice of summoning the jury; why are they less requisite in the notice for treating?

In the notice for treating in this case, no admeasurement is given; this objection, however, will not now be relied on, because this Court, in a late case of *Sims v. The Com-*

(a) P. 5656, Item, 6.

(b) See *Scales v. Pickering*, 4 Bing. 452.

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mercial Railway Company (a), thought, that, although a notice of this kind did not specify the dimensions and admeasurements of the particular portion of the property proposed to be taken, yet, that as the quantity of the land actually required, might be ascertained by reference to a given diagram or proportion, the notice was sufficient.

In this case there are three most important discrepancies between the notice for treating and the plan annexed thereto, and the jury, warrant, or precept, and the plan thereto annexed.

1st. In the former, no intention is expressed or shewn of taking a triangular piece of land on the north side of the south-west wall of the bonding-yard, which the latter proposes to take.

2nd. In the former, notice is given to take certain houses, which are omitted in the latter.

3rd.—And which is the most material objection,—the line, as laid down in the former notice, deviates from that laid down in the latter.

Three distinct objections arise out of these discrepancies.

1st. The Company have no right to take the triangular piece of land, for which they have given no notice to treat. The 11th section empowers them to treat for land, and the 22nd section requires them to do so previous to calling out a jury. 2nd, the Company have given a jury notice for part only of an entire piece of land, for which, by the first notice, they have required the plaintiffs to treat; they cannot summon a jury for one portion of an entire property; were it so, any entire property might by caprice be severed into one hundred separate lots, and the like number of juries summoned to affix the value for the whole. 3rd, If this deviation be allowed, no landowner can affix a value to his property in answer to the requisition to treat.

It will be said, that no material injury would be occasioned to the plaintiffs by the taking of this portion of the

(a) To be reported, post.

bonded yard, because, it will be said, this part is seldom used; the affidavits of the plaintiffs shew, that this portion is most important, as involving the question of the renewal of the bonding license.

With respect to the service of the notice, requiring the Company to purchase the whole of this property under the 50th section, the notice was regularly served on the 22nd of August, 1838, within the twenty-one days required by that section: the construction of the clauses of the act in regard to this notice, appears to be as follows—the first notice is to state the intention of the Company to take the lands; the landowner is to have fourteen days, within which to state his interest in the land required, and, that preliminary inquiry having been ascertained, a notice, requiring him to treat, is to be given; then a period of twenty-one days is to be allowed for settling the terms of treaty, before which a jury cannot be summoned.

Independently of any objection as to the due service of notice under the 50th section, the uncontradicted statements of the solicitors of the Company, that the plaintiffs' solicitors might, in regard to serving the notice, take their own time, is a sufficient waiver of the most strict requisition of the act. The service at the office of the Company is good, under the language of the 190th section.

Mr. Jacob, Mr. Richards, and Mr. Bigg, contra.

The premises required by the Company, were never designated as “a yard,” until after this act was passed. No document connected with the title anterior to that date has been produced, in which such a designation is used. The treasury bonds of 1824, and 1831, describe the premises as “Richardson's Wharf.” It is, however, said, that the Company are excluded, by the language of the schedule, from disputing a description, which is therein affixed to it.

The 45th section enumerates certain descriptions of property, which the Company are not to be at liberty to

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take compulsorily, unless specified in the schedule; it therefore became necessary, on the part of the framers of the schedule, to include in it every species of property, with respect to which any cavil might arise. It was for such reason only, that this property was mentioned in the schedule: it is manifest that many kinds and descriptions of property are enumerated in the schedule, which do not come within the meaning of any one of the words of the 45th section. The following descriptions of property will be found in the schedule, which can have no affinity to the words of the section,—namely, “timber-yard, occupation road, occupation way, ditch, watercourse, field, road.” The 45th section was not intended to have a more extended signification than the 50th. The plaintiffs have affixed an erroneous meaning to the word “yard,” which is to be construed “yard attached to a house,” and not, as the place in dispute is, an isolated inclosure of three acres. In the 50th section, the words “yard and garden,” are placed between the words “house and warehouse,” thereby confining the meaning of the word to something connected with a building.

The definition of the word “yard,” as given by Dr. Johnson, is “Yard, *s.* ground inclosed belonging to a house;” but if the definition given by Bailey is correct, and the meaning be as extensive as he would lay down, why was it necessary to incumber the clause with the words “inclosed ground, planted as ornament or shelter to a house?”

With respect to the three distinctly specified objections,—1st, if the Company are compelled to take the whole of the premises, that objection cannot arise: 2ndly, there is nothing to shew that an agreement for the part not included in the jury precept, has not been concluded between the parties: 3rdly, as to the deviation (if any), the bill states “that the plaintiffs have reason to believe, that the deviation in this respect, is authorized by the act.”

The notice, requiring the Company to purchase, was

irregularly served: with respect to a waiver of the objection, the solicitors of the Company did not request by letter any extension of the time, which, upon the statement of the bill, they were bound to do.

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Mr. *Wigram*, in reply.

One of three points must be conceded,—the premises in question are not a yard within the meaning of the act; it is doubtful whether they are so; or they clearly are so. In the two last cases the injunction must be granted. The act provides, that if the Company, in the exercise of their powers, take a yard, they must take the whole; and the same act describes this property as a “timber yard.” It is not the less a yard, because the peculiar nature of it is described; and it lies upon the Company to shew, that it is not that kind of yard which was contemplated (*a*).

The object of introducing all these descriptions or parcels of property in the schedule, is, that the schedule might comprehend all that the 45th section was intended to protect; in order that the power of the Company over all such property might be insured.

The circumstance that one side of this yard forms a wharf, does not affect the propriety of the designation.

The effect of the 22nd section, is, to prevent the Company from summoning a jury to assess the value of part only of the lands specified in a notice. The jury are there directed to assess the value and compensation for “such lands,” referring to lands which had been previously the subject of a notice, and it does not authorize the proceeding to assess the value of less or more.

The VICE-CHANCELLOR.—One of the principal questions *March 11* to be considered is, whether, in a case where the first notice describes what the Company mean to take, it is competent

(*a*) See what is said by the Lord *Manchester and Birmingham Rail-Chancellor*, in *Greenhalgh v. The way Company*, ante, p. 101.

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for them afterwards to issue a jury precept, to try the value of a part of what was comprised in that notice; and another question is, whether it is competent for the Company to demand by the jury precept, that a value shall be assessed of a portion of the land, which was not described in the first notice?

With regard to the first question, it does not appear to me, that the act of necessity requires that there shall be, at one and the same time, a trial by a jury, to assess the value of the whole of the land which is demanded by a first notice; for, not only is there no express clause in the act which requires that it shall be so, but the 22nd section is so constructed, as to shew, that in many cases it necessarily cannot be so; for, by that section, which prescribes the mode in which juries are to be summoned, it appears, they may be so summoned from three places; from the county, the city, or the liberty of the Tower of London. Supposing an individual to have tenements partly in all these three places or liberties, the necessary consequence of that would be, that, although the whole might be demanded in the first notice, yet the divided value of the whole could not, under the act, be determined at the same time. The entire case must be resolved into three cases, which must be tried by three separate juries, and therefore at three separate times, because it cannot be reasonably supposed that there will be an exact synchronism in the three trials. I think, that after the Company have given the first notice, they would be allowed to try the question as to the value of a given portion of that property, separately from the value of another portion; and consequently, that, in that respect, this precept would not be wrong.

It is said, however, that the precept is faulty, because it demands more, that is other land, than what is comprised in the first notice. To that extent I think the precept is wrong; because, being to issue in default of an agreement to treat for and settle the price of land to be demanded by a previous

notice, there never can be any default in an agreement or endeavour to treat for the price of land never comprehended in such a notice. The counsel for the Railway Company state, that the Company are quite willing to confine the jury inquest upon the precept to that portion of the land embraced by the first notice,—I allude particularly to that portion of the plaintiffs' yard which is to the north side of the railway, and to that other small portion to the south side of that which on the first notice is delineated as a shed, but being no part of the plaintiffs' yard. I think, that if the Company undertake, that the only question to be submitted to the jury shall be the value of that portion of the yard which is pointed out by the original notice, they ought to be permitted to proceed to that extent.

With respect to the question, whether sufficient notice was given to the Company within the meaning of the 50th section, coupled with the 190th, I think the notice was sufficient. The expression of the 190th section is this. [His Honor read the section.] It appears, that the plaintiffs' solicitor did late at night, it does not matter at what hour, on the last of the allowed twenty-one days, leave the notice in question at the office of the Company. The words of the 190th section do not require the notice to be left personally with the secretary or clerk of the Company; and it is easy to imagine cases in which personal service on them would be impossible. I see nothing in the act which says, that there shall be an interval of time between the leaving the notice and the end of the twenty-one days, which shall give the secretary or clerk time to consider the effect of the notice, and therefore I consider the service of the notice sufficient.

The next, and which is the principal question, relates to the meaning of the word "yard;" and I certainly think, that the true way of construing the act is to look at the different sections in which that word, either singly or with anything adjoined to it, in the way of an adverbial sub-

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stantive, or anything else which may give it a particular qualification, is used, and then to consider whether it is not evident, on the face of the act, that the word must have different significations in the different sections. Now the 2nd section says, "that where the word railway is used, the same shall be understood to include the branch railways, yards, stations, wharfs, and other works thereby authorized to be made." Now it is to be observed, that the legislature is there speaking prospectively of non-existing things, and a yard might be such a yard as the Company might choose to construct of any description whatever; and there is nothing in that section to restrain the character of the yard, except the opinion which the Company's engineers or others may entertain about its utility, or the mode of constructing it. The 8th section is the first section which alludes to the schedule; and when the schedule is examined, you find, besides the word "yard," the words "timber yard, stone yard, chapel yard, livery stable yard, open yard, feeding yard for cattle, cattle yard, dung yard, yard to workshops, yard or vacant ground, covered yard, mill yard." I cannot but think that those, who framed the schedule, meant to make a distinction between the term 'yard' *simpliciter*, and the term yard adjoined to the various other words which are found in the schedule, which was, I presume, made for the purpose of describing the property, through which the Company were to be authorized to make their railway. Then, in the 9th section you find, that, for the purposes of the act, the Company are empowered to enter into and upon the land of any person whatever, and to survey and take levels, and to set out and appropriate such parts thereof as they are empowered to take or use, "and in or upon such lands or any lands adjoining thereto, not being houses, buildings, yards, or gardens, to bore," and so on. I cannot but think, that "yards," coupled as they there are with the terms, houses, buildings, and gardens, have a reference to houses and

buildings. It seems to me, that the Company may not go upon lands generally, but only upon those lands which are not "houses, buildings, yards, or gardens." In a subsequent place the words are conjoined, evidently with reference to that privilege which the law of the country always pays to buildings inhabited by man. In the 43rd section there are similar expressions. "Whereas, in making and excuting the railway and the several other works by this act authorized, it may be necessary for the Company, their agents and workmen, to enter upon and take temporary possession of some parts of the lands not being houses, buildings, yards, or gardens;" then the section proceeds to direct, that there shall be compensation made for that temporary damage which may be done under the 9th section, and it is therefore evident, that when speaking of lands, the legislature has, as a matter of caution, introduced parenthetically the same expression, "not being houses, buildings, yards, or gardens," as before introduced in the 9th section, because, if these words had not been introduced, it might have been said, that there was a variance between the two sections, and that the true effect of both together, would be to allow the Company to do temporary damage on lands generally, which clearly was not the meaning of the legislature (a). It therefore appears to me, that the word "yard" in the 43rd section, must throughout the act be the same as in the 9th section, whatever may be the meaning attributed to it in that section. Then take the 45th section. [His Honor read the section.] I must consider, that in this section, the term "yard" must be taken with reference to a building; because, although there are some other things which may, and often do, exist wholly disconnected from any building, yet they are all things of a very precise and determined character, and the reason for the exception is almost evident on the face of them. The other things are "a paddock, plantation, planted walk or avenue to a house,

(a) See *Innocent v. The North Midland Railway Company*, ante, p. 242.

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or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees;" which shew the regard which the legislature has to the thing "house," or a thing planted and set apart "as a nursery for trees," because of the value of, and the great injury that might be done to, a house or to a nursery of trees; and neither of them are to be taken, unless specified in the schedule, or without the consent in writing of the owners or occupiers. I do not, however, think that this section materially helps to decide the meaning of the word "yard." Then comes the 50th section. [His Honor read it.] Now what does the word "yard," as here used, mean? Firstly, with what words is it connected? "House and garden" come before it, and "warehouse, building, or manufactory," come after it. I think, therefore, that the mere collocation of the words implies that the terms "yard and garden" are to be taken in connexion with a house. It would be most extraordinary if the legislature—and it must be assumed that the legislature preserves a unity of idea, unless there is anything to the contrary—had first taken a house, and then a garden and a yard as disconnected from a house, and then returned again to the original idea, with a mere modification of the word "house," namely, a 'warehouse,' 'building,' or 'manufactory.' I must consider, that, attending to the mode in which the English language is used, the mere position of the words shews, that the garden and yard are to be taken in connexion with a house.

These acts of parliament are made by persons conversant with the law, and it is not wholly immaterial to consider what is the notion by law attached to a house. Coke Littleton, in the 1st institute (5 b.), says, "By the grant of a messuage or house, *messuagium*, the orchard, garden, and curtilage, (that is the yard), do pass," and so an acre or more may pass by the name of a house. It is also remarkable, that Sheppard, in the Touchstone, giving a summary of the words which are used in a fine, and the

order in which they are to be placed, mentions the messuage, the toft, the mill, the dove-house, and then the garden; and, if you look into Wilson on Fines, you will see that for about one hundred pages, there are instances given of fines, and I think that there is but one, which seems to have been a fine of a very small property, in which the word curtilage is mentioned; although I believe in all of them messuages are mentioned without expressly naming the curtilage. The messuage would seem to imply the house, and all that belongs to the house; the toft in law signifies the site of a messuage; and then you get a step further, to the dove-house; and thence to the garden. Although a garden is always expressly named in a fine, yet Lord Coke tells us, "that by the term *messuagium*, the garden will pass without any express mention." In the present case, I think, that when the legislature used the word "house," they adverted to the general sense in which it is used; but yet, for the purpose of excluding any doubt, they also added the words "garden and yard;" but when they added those subsequent words, I think they did not mean a thing which in any sense is a yard, but that which in one precise sense is a yard, namely, which is connected with a messuage, and is capable of passing by the description of a messuage. The framers of the schedule have repeatedly introduced the word "yard." If they had meant, that every thing which comes within any specific description, should pass by the general term "yard," why add the specific description? It would have been sufficient, instead of describing a yard belonging particularly to a given individual, and calling it a stone yard, to have called it a yard; so, instead of entering into a lengthened description of "feeding yard for cattle," to say, "a yard;" and so with respect to all the other denominations, other than the simple word "yard," to be found in this schedule. It appears to me, upon the whole of this case, that this extensive piece of ground, which is in nowise connected

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with a messuage or with any building, (other than in so far as a deal shed may be called a building), but which is not connected with either a house, a warehouse, a building, or a manufactory, is not privileged property within the meaning of the act. My opinion, therefore, is, that the Company may lawfully take possession of part of this yard, without being compellable to take the whole, and that in this respect no objection exists as to the issuing of the precept.

I am asked, by the notice of motion, to restrain the Company from all further proceedings upon the warrant or precept issued by them; but, with the qualification I have mentioned, if it be desirable to make that qualification, my opinion is, that the Company may lawfully proceed upon the precept, and therefore, in that respect, I refuse the injunction. I likewise refuse the next part of the injunction asked, namely, to restrain the Company from proceeding upon any other warrant or precept for a similar purpose. Then as to the third part, seeking to restrain them from entering upon or taking possession of the land mentioned or referred to in the warrant or precept; there is no pretence for saying, (if my view of the act be right), that the Company are proceeding in an illegal manner. It therefore appears to me, that, with the undertaking I have adverted to, (if the plaintiffs require such an undertaking), this injunction ought to be altogether refused; but being a question of some nicety, I say nothing as to the costs. With regard to a case at law, I certainly shall not myself direct a case; but I shall not refuse it if asked by the plaintiffs.

The plaintiffs appealed from this order to the Lord Chancellor.

April 20th.

Mr. *Wigram*, and Mr. *Walker*, for the appeal motion.

Mr. *Jacob*, Mr. *Richards*, and Mr. *Bigg*, contra.

LORD CHANCELLOR.—In considering cases which arise under these acts, as the law between the parties is to be found only in the acts, and as the right of the Company depends entirely upon them, the first question to be asked is, whether that which has been done is in strict conformity with the act? If it turn out not to be so, this Court cannot permit parties to deal with the property of others, and to take the chance of a decision after the injury has been accomplished (a).

Looking at this case in the confined view in which I am compelled to do by the course taken by the Company, I have no difficulty whatever in saying, that the Company have not done that which the act requires them to do. In the first place, what I am about to do is, to extend the injunction against proceeding upon this precept; that is nothing more than what the Vice-Chancellor has done by prohibiting the Company from proceeding before the jury to take any part of the land not specified in the notice; for nobody can by possibility find out what part of the land is included in the notice, and what part is not: nothing can be more vague than the notice. There are two plans, both of which are produced by the Company, which clearly do not coincide; there being no admeasurements, nothing to which, with any degree of accuracy, it is possible to refer, for the purpose of ascertaining the degree of variation. It would be next to impossible to ascertain when the parties are within the line prescribed by the injunction, and when they have exceeded it,—of itself, a very serious objection to granting an injunction, because, when this Court has granted an injunction, it ought to preserve to itself the means of ascertaining when the parties have infringed it. Now it would be a matter of so much uncertainty, that the Court would find it very difficult, if not impossible, to act upon the order of the Vice-Chan-

(a) See also *the River Dun Na-Midland Railway Company*, ante, *vigation Company v. The North* p. 153.

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cellor, in the case of carrying the order into execution, against the party who may be said to be guilty of contempt; for the materials do not exist, under which the Court can be satisfied, in many cases, which may be supposed, whether the party had or not departed from that which the Vice-Chancellor has alone permitted to be done. Upon looking at the earlier parts of the transaction, I find in this act, what I believe is to be found in all similar acts, that the Company, being minded to take particular property under the provisions of the act, are required to give notice to the owner thereof. The party to whom the notice is given, is, within a certain time, to communicate to the Company what the nature of his estate is, and what sum he is willing to take for it. The notice and counter notice being so given, the parties have the opportunity, if they can, of coming to an amicable arrangement. It was the object of the act to put them in a situation of being enabled so to do. If they can agree as to part, so far the question between them is settled; the act uses the words "lands in question;" if the parties agree as to part of the lands required by the Company, the lands thus agreed upon cease to be "lands in question." If, on the other hand, they do not agree, then all the lands required by the Company, and to which the notice applies, are "lands in question." Then the act proceeds to provide the means by which the remuneration to be paid to the proprietor for "the lands in question" is to be ascertained. Now, if there be no agreement as to any part of the property, the "lands in question," of which the value is to be ascertained, are the lands comprised in the first notice:—The moment the Company have given that notice, and have, in the way which the act prescribes, communicated to the proprietor what land they require, the relative situation of vendor and purchaser is created by that notice (*a*). It gives the proprietor a right to insist upon the Company taking that, of which they have given

(*a*) See *Doo v. The London and Croydon Railway Company*, ante, p. 257.

notice of their intention to take: a right to be enforced by this Court, or by a Court of law by mandamus. It therefore constitutes a contract, or, at all events, it constitutes the situation of vendor and purchaser; for which, however, the sum to be paid, which is a material part of ordinary contracts, remains to be ascertained. It must be ascertained under the provisions of the act, by reference to a jury, to be summoned from the county or district within which the lands are situate; and I am not now called upon to consider the case of a house standing partly within one district and partly within another. It may be, that the machinery of the act is but ill adapted to investigate the value of property of that description; but all this property is within the same district. The Company, in this case, gave notice of an intention to take a certain portion and description of land, a plan of which was attached to their first notice; it runs through part of the land in question, it runs over certain other property belonging to the same individual; their notice is to take that line of property described by a red colour in the plan. By giving that notice, they put themselves in the character of persons contracting to purchase that land under the provisions of the act. The parties not having come to any agreement, the Company resort to that power which the act gives them, of issuing a precept for the purpose of bringing the case before a jury; and the course they adopt is, to abandon for this purpose a large portion of the land comprised in their first notice, and to include in it a considerable portion not included in that first notice. Now what reference has the notice to that which they are calling on the jury to set a value on. It is not one half of that which they originally proposed to take, and it comprises a portion of that which they gave no notice of an intention to take. It is admitted, that, so far as it comprises the latter, the Company are not in a situation to go before a jury; but what are the jury commanded to do? they are commanded to

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ascertain and fix the value of the land comprised in the plan attached to the precept, not only by description, but by measurement of feet and inches. They are not called upon, nor have they, within the provisions of the act, any authority to fix a value on the land, except that contained in the precept; they are summoned for that purpose, and the property of which they are to fix the value, is in terms prescribed by the precept. But then, what notice is that to the party? The act requires that this step shall be preceded by a previous notice of what is to be the subject-matter of inquiry before the jury; but the jury notice comprises a fraction only of that which is comprehended in the previous notice; and if I were to consider this as within the provisions of the act, it would be in the power of the Company, having given a notice for any portion of property, to subdivide that into as many proceedings before the sheriff as they might think fit. Having given notice for one hundred yards of land, they might have a separate jury process for each yard. There is nothing to prevent it, if it is in the discretion of the Company so to subdivide their contract, and to ask the opinion of the jury upon each particular portion of the land which they propose to take. I am not, therefore, to consider the difficulties which may arise under other circumstances, namely, of part having been agreed upon. I am not to consider the difficulties, which might arise if the property were partly in one district and partly in another: I am to consider a case where one entire notice is given for the purchase of land within one given district, and I find no provision of the act which authorizes the Company, in such case, to subdivide the contract, and to ask a jury to fix a value upon any particular portion, without any previous notice. According to the argument for the Company, not only are they not bound by the notice, but they are not bound by the precept: so that when the proprietor comes before the jury, having a notice for a considerable

portion of his property, and all his evidence being addressed to that, which constitutes the nature of the inquiry according to the notice, he is then to be told, that the intention is not to take the opinion of the jury upon that particular portion of property; because, if the Company are at liberty to depart from that which is included in the first notice, they are also at liberty to depart from that which is included in the precept, and they can then ask the jury to give a verdict upon any fraction of the case which they think proper.

It is said, that in this case the parties can be under no misapprehension with regard to the portion which is not included in the notice, because it is known now by discussions in Court, that the Company mean to abandon that part of the case, and do not mean to ask the jury to give any verdict as to the value of that portion.

It happens that the parties may know that now; but I do not apprehend that any party can know to what portion that applies, or as to what part of it the opinion of the jury would be asked, because the variation of the line, and the uncertainty as to what is to be the width of the line, according to the original plan, renders it a matter of considerable difficulty to know what part of the originally prescribed line, or of the line appearing on the precept, it is the intention to ask the jury to affix a value. It is quite obvious, if the act authorizes the Company to do this, they are not bound to communicate to their opponents what they intend to do; and having given a precept for a large quantity of land, they may come before the jury and ask their verdict upon a case in which the other party had no previous intimation of their real intention. It is obvious, that that would be a total departure from the act: it would be a great inconvenience to those who have to deal with these companies. The Company must confine their rights within the limits of the act of Parliament. I find the provisions of the act do not justify any such proceed-

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ing. The case before the jury must be consistent with the precept, and the precept must be consistent with the notice. The act of Parliament prescribes to the Company the above mode of ascertaining the value of the land, if they are unable to agree upon it with the proprietor. I find myself precluded from deciding that which is the principal question in this case; and I am under the necessity of disposing of this case on these preliminary points. The result is, that I extend the injunction against proceeding in any manner upon this precept.

[It is understood, that this suit has been compromised].

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March 20th.

Between JOHN ALDRED, WILLIAM SWANN, and
JOHN BOOMER, on behalf of themselves
and all other the trustees of the turnpike
road from Rotherham to Swinton - Plaintiffs,
and
THE NORTH MIDLAND RAILWAY COMPANY, Defendants.

The trustees of
a turnpike road
agreed to assent
to a Bill in
Parliament for
the formation
of a railway,
on the condition that the railway should pass over the road at a sufficient elevation, and the road be not lowered or otherwise prejudiced. This qualified assent was returned in both houses of Parliament;—the Bill passed.

THE bill stated two several acts of Parliament, made respectively in the 49th year of the reign of George the Third, and the 7th and 8th years of the reign of George the Fourth, whereby the plaintiffs, and the several other

the railway should pass over the road at a sufficient elevation, and the road be not lowered or otherwise prejudiced. This qualified assent was returned in both houses of Parliament;—the Bill passed.

The 12th section of the act, among other powers, authorized the Company to raise and sink rivers or streams, roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway, provided that the Company should not divert, obstruct, or impound any river or water to the prejudice of any mill or manufactory.

The 72nd section enacted, that the arch of any bridge for carrying the railway over or across any turnpike road, should be of a height from the surface of such road to the centre of such arch, of not less than sixteen feet, provided that the descent under any such bridge should not exceed one foot in thirty feet.

The act contained no particular proviso as to the road in question.

Held, by the Vice-Chancellor, that the modified assent of the road trustees, the terms of which were neither embodied in any agreement between the trustees and the Company, nor adopted by the legislature, afforded no equitable ground for restraining the Company from enforcing, with regard to the road in question, all the powers conferred by the act.

That the Company were authorized to sink the original surface of a turnpike road, in order to give the specified elevation to the arch of a bridge, erected for carrying the railway over such road, notwithstanding that the effect, from the peculiar situation of the road, would be, to render it liable to be occasionally flooded.

persons therein named and their successors, duly qualified as therein mentioned, were appointed trustees, for amending, widening, altering, repairing, and improving the turnpike road from Rotherham to Swinton, in the West Riding of the county of York, and for otherwise putting the said acts into execution. That, at the time of passing the act next mentioned, the said turnpike road had been perfected and completed, and still continued to be maintained as a turnpike road under the powers and provisions of the above-mentioned acts.

[The bill then stated the act, incorporating the North Midland Railway Company (a).] That by the 5th section of the last-mentioned act, it was enacted, that it should be lawful for the Company and they were thereby empowered to make and maintain the railway with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated on the plan, and described in the book of reference deposited with the respective clerks of the peace of the county of Derby, and the West Riding of the county of York. That by the 12th section, it was enacted, that for the purposes and subject to the restrictions and provisions of the act, the Company were empowered to take such lands as might be necessary for the purposes of the act, and to make and construct in, upon, across, under, or over the railway or other works, or in, upon, across, under, or over any lands, streets, hills, valleys, roads, rail-roads, or tram roads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences; and, for the purposes therein mentioned, to erect and construct such houses, wharfs, warehouses, toll-houses, landing places, engines, and other buildings, machinery, apparatus, and other works and conveniences, as the Company should think

(a) Ante, p. 136.

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proper; and to alter the course of any rivers, canals, brooks, streams, or watercourses as might be necessary for constructing and maintaining tunnels, bridges, whether temporary or permanent, or passages over or under the same, and to divert or alter the course of any rivers or streams of water, roads or ways, or to raise or sink any such rivers or streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway, and to make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway; and from time to time to alter, repair, or discontinue the before-mentioned works, or any of them, and to do and execute all other matters and things necessary for making and maintaining the railway and other works by the act authorized. That it was by the 72nd section enacted, that where the railway should cross any public carriage or bridle way, either such public carriage or bridle way should be carried over the railroad, or the railway should be carried over the public carriage or bridle way, at the expense of the Company, by means of a bridge, where not otherwise provided for by the act, of such construction as thereafter mentioned; and that where any bridge should be erected by the Company, for the purpose of carrying the railway over or across any turnpike road, the span of the arch of such bridge should be formed, and should at all times be of such width as to leave a clear and open space under every such arch, of not less than twenty-five feet, and of a height from the surface of such turnpike road to the centre of such arch, of not less than sixteen feet, and that in all cases wherein any part of any carriage or horse road, foot road, or any other communication either public or private, should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, the Company should at their own expense, before any such road or other

communication should be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road or other communication to be set out and made instead thereof, and such new road should be as convenient for passengers, cattle, or carriages, as the said road or other communication so to be cut through, raised, sunk, taken, or injured, or as nearly so as might be.

That the said act of Parliament was passed on the 4th of July, 1836, and the Company have, since the passing of the act, proceeded to construct the railway, and to carry into execution the works authorized by the act; and, for the purpose of carrying the railway across the turnpike road from Rotherham to Swinton, they have caused a bridge to be erected over the road along which the railway is intended to pass. That there is considerable traffic along the said turnpike road, and the lands in the neighbourhood of the road, and particularly where the railway is intended to be carried across it, are very low, and subject to floods, and the road is frequently flooded to a considerable depth at or about that part where the railway is intended to be carried across it, and there is a considerable stream of water adjoining and running parallel with the north-west side of the road, and the ordinary surface of such stream of water is not more than two feet nine inches below the present surface of the road.

That previous to and in contemplation of the formation of the railway, Mr. H. Vickers, one of the solicitors for the Company, applied, on behalf of the projectors of the railway, for the assent of the trustees of the turnpike road, to carry the railway across the road; and at a general annual meeting of the trustees held at Rotherham, on the 1st February, 1836, it was ordered, that the committee of the trustees should assent to the railway passing over the road, provided it should pass over at a sufficient elevation, and that the road should not be lowered to effect that elevation or be otherwise prejudiced; and such qualified

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assent was communicated to Mr. Vickers, who acceded thereto on behalf of the Company.

That in the beginning of the month of December, 1838, the committee of the trustees of the road were informed that the arch of the bridge, by means whereof the Company proposed to carry the railway across the turnpike road, was considerably lower, with reference to the surface of the road, than the centre of the arch was required by the provisions of the act to be, and that it was the intention of the Company to lower the surface of the road, in order to obtain the height of sixteen feet from the surface of the road to the centre of the arch, and the trustees thereupon caused the following notice to be served upon Mr. Vickers, who duly accepted service thereof.

[The bill set forth the notice, which stated, that the trustees of the road would, by an injunction, or by means of the powers and penalties given and prescribed in and by the act, restrain or prevent the lowering of the road from the then level, and also the erection of any bridge of a less height than sixteen feet from the then surface of the road.]

That notwithstanding the notice, the Company proceeded with the erection of the bridge and completed the arch thereof, and the height of the centre of such arch from the surface of the road does not exceed fourteen feet eight inches, instead of being sixteen feet as required by the act. That on the 23rd of January, 1839, the Company began to break up that part of the road which runs under the bridge, for the purpose of sinking or lowering the surface of the road, and thereby obtaining the height to the centre of the arch of such bridge required by the act, and they have proceeded to break up, sink, or lower the road, although requested by the trustees not to do so, and, in order to finish the alteration before the plaintiffs could make any application to this court to restrain them from so breaking up the road, they have caused their works to be carried on

by night as well as by day, and employed all the labourers they could engage upon such works, and they have sunk or lowered the road to the depth of sixteen inches from the former surface thereof.

The bill charged, that the Company are not entitled under the circumstances aforesaid to break up the surface of the road, or to sink or lower the same. That even if the Company were entitled to break up, sink, or lower the surface of the road under the bridge, the sinking and lowering thereof is contrary to and in violation of the terms and conditions upon which they obtained the assent of the trustees to cross the road, and that, according to the terms and conditions upon which such assent was given to the Company and received by them, they had no right to sink or lower the road, or to do anything which might otherwise prejudice or injure it, and that they were bound to erect the arch of any bridge to be carried across the road of such an elevation as not to render it necessary to lower the road. That the Company by their agent, who applied for the assent of the trustees to cross the road, recognised and acceded to the terms and conditions upon which such consent was given, and they thereby undertook and agreed not to lower the surface of the road, or to do anything whatever to the prejudice of such road; and as evidence thereof, that, in conformity with the standing orders of the two houses of Parliament, the answers given by the different land owners and occupiers, along the line of the railway, to the applications made to them, prior to obtaining the act of Parliament, are recorded in the private bill office, and the answer of the trustees to the application made to them by the Company, for their consent to the bill as entered in the consent book at the private bill office, is "that the trustees assent, provided the railway be carried over the road at a sufficient elevation, and that the road be not lowered or otherwise prejudiced thereby." That, in consequence of the Company having

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acceded to the terms and conditions upon which such consent was given, the trustees offered no opposition to the bill, and did not deem it necessary to attend and watch the same in Parliament, for the purpose of protecting their interest in the road, which they would have done if such conditions had not been acceded to by the Company. That the sinking and lowering the road will be attended with irreparable injury and damage to the road; for that the situation of the lands in the immediate vicinity of that part of the turnpike road, where the railway is intended to be carried across it, is very low, and the road is frequently flooded, sometimes to the depth of from one to two feet on the surface of the road as originally formed, and the trustees have been under the necessity of causing that part of the road lying near to the railway bridge to be raised, and they were continuing to raise the level of the road in the direction of the railway bridge, for the purpose of placing it as much as possible above the level of the floods, and it was their intention to raise the whole line of the road as soon as their funds were in a situation to enable them to do so. That the trustees of the road have caused a survey and examination to be made of the road, and of the works of the Company now in progress, for the purpose of carrying their railway across the road, and it thereby appears, that the road, as originally formed, was as low as practicable, having regard to the nature of the low country through which it passes, and to the streams or brooks in the immediate vicinity thereof, and to the occasional floods to which that part of the country is liable, and that the surface of such road was considerably below the height which such floods usually obtain, and was frequently overflowed, and that if such road is permitted to be, or remain sunk or lowered under the railway bridge, it will be liable to be flooded to such a depth as to be at times wholly impassable, and that it will not be possible to improve the road or raise it above the flood level as intended. That

the embankment raised by the Company, for carrying their railway over that part of the country where it crosses the road is considerably higher than the surface of the ground of the road, and offers additional obstructions to the escape of the waters in cases of floods, and the arches and channels formed in such embankment are not of sufficient size or capacity to allow of the escape of the waters in such cases, and the road will now be much more liable to be overflowed, and to a much greater depth than before such embankment was made; and the waters will remain on such road for a much longer period than usual. That the Company and their agents were fully apprized of the low situation of the ground where the railway crosses the road, and of its liability to be frequently flooded to a very considerable extent; and that, according to the original plans laid down by the Company, for carrying their railway across the road, the bridge was to have been constructed of such a height as to leave a space of sixteen feet at least, from the centre of the arch of the bridge to the surface of the road: that in causing it to be built of the height of fourteen feet, and in breaking up and lowering the road, the Company have deviated from the contract entered into by them, on the formation of the bridge: that it never was intended, according to such contract, to lower or sink, or break up the surface of such road; but that by their contract with the person who has taken the work, the Company agreed and stipulated, that the centre of the arch of the railway bridge should be sixteen feet at the least from the surface of such road, and that such road should not be sunk or lowered, or broken up, or otherwise prejudiced. That the railway may, according to the opinion of competent engineers and surveyors, be still carried over the road at the required elevation from the surface thereof, without any damage or inconvenience to the railway; and that it was wholly unnecessary to lower or sink the surface of the road, for the purpose of carrying the railway over it at the height

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required by the act. That irreparable damage and injury will be caused to the road, if the Company sink or lower the surface thereof. That the plaintiffs are trustees of the turnpike road, and that there are many other persons who are trustees thereof, and who are not known to the plaintiffs, and who, if known, are too numerous to be made parties to this suit.

The bill prayed, that the Company, their servants and agents, may be restrained by the order and injunction of the court, from breaking up, sinking, or lowering the road where the railway bridge is thrown over, for the purpose of carrying the railway across the road; and in case the Company shall have broken up, sunk, or lowered the road, then, that they may be decreed to replace the same of the same height and construction that it was before they broke up the same; and that, in the meantime, they may be restrained by the order and injunction of the court, from proceeding with or continuing the archway so erected, or in progress of erection, for carrying the railway across the turnpike road, or any other archway, which shall not be of the height of sixteen feet from the original surface of the road; and that they may be likewise restrained from making, using, or proceeding to make or use that part of the railway which is carried or intended to be carried across the road by the railway bridge, until they shall have restored the road to the original and proper level. And for further relief.

The plaintiffs gave notice of a motion for an injunction.

Affidavits were filed on both sides. They were principally directed to the question of the liability of the turnpike road to be flooded at the spot where the railway arch was erected. The evidence on this point was exceedingly voluminous and contradictory.

The *Solicitor-General*, and Mr. *Kenyon Parker*, for the motion.

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Affidavits were filed on both sides. They were principally directed to the question of the liability of the turnpike road to be flooded at the spot where the railway arch was erected. The evidence on this point was exceedingly voluminous and contradictory.

The *Solicitor-General*, and Mr. *Kenyon Parker*, for the motion.

The 72nd section of the act prescribes, that the arch of any bridge for carrying the railway over a turnpike road, shall be of a height of not less than sixteen feet from the surface of the road to the centre of the arch. The word "surface," means the actual then existing surface; not that to be created at the will or convenience of the Company. A reasonable construction must be put on that part of the clause, which says, "that the descent under any such bridge shall not exceed one foot in thirty feet," so as to limit the general import of the words. It must be held, that such a power will not extend to a case like the present, where the exercise of it will completely destroy the road. The 12th section gives the Company the power to raise or sink roads, but can never be construed to authorize them so to deal with existing roads, as in any manner to destroy the use and benefit of them by the public. The legislature meant, that any road to be raised or sunk should be as useful for all purposes, and at all seasons of the year, as before any alteration. The act directs, that while the Company are altering any road, they shall make a temporary road as convenient in all respects as that under alteration. It would be singular, if this stipulation, as to public convenience, were only to endure while the temporary alteration was in progress.

Secondly,—with regard to the question of assent. The plaintiffs abstained from offering any opposition to the act, on the understanding, that the terms of their qualified assent, which had been acceded to by the Company, would be observed. If the Company did not intend to abide by the terms of such qualified assent, they ought to have at once repudiated it. They induced the plaintiffs to believe, that they acceded to the terms proposed, and thereby disarmed all opposition to the bill on the part of the trustees of the road. *Edwards v. The Grand Junction Railway Company (a)*.

(a) 7 Simons, 337; 1 Myl. & Cr. 650; Ante, 173.

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Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Bacon*, appeared to oppose the motion, but were not called upon by the Court.

THE VICE-CHANCELLOR.—It seems to me, that there is no foundation for this application. When the application was made to the plaintiffs for their assent, the assent was given in these terms:—"The Committee of this road do assent to the application for the North Midland Railway passing over the turnpike road, provided the railway pass over the road at a sufficient elevation, and the road be not lowered to effect that elevation, or be otherwise prejudiced." That is the form in which they assented. There was nothing to prevent them from opposing the bill, for the purpose, at least, of procuring a clause to be introduced into the bill, to the effect of the modification upon which they insisted. There was no undertaking by the applicants for the bill, that there should be any proviso contained in the bill, co-extensive with the particular proviso contained in the assent. If the House of Commons thought it right, on a view of all the assents and dissents connected together, some of which might be simple,—simply assenting or simply dissenting,—and some with modifications, to pass the bill in the terms in which they have done, and the whole legislature has given it the effect of an act of Parliament, it seems to me, I can only look at the act of Parliament.

I am quite willing to admit, if there had been an agreement made on behalf of the Company, that the Company would not have an act, other than that which should contain such a clause; or whatever the act might be, they would, with respect to themselves and the road trustees, take care that their bridge should be built in a particular manner, this Court would hold them bound by that agreement; and the Lord Chancellor has affirmed the doctrine which, I remember, I laid down in *Edwards v. The Grand Junction Railway Company*; but it seems to me, that

this case is totally devoid of any such circumstances. There is nothing whatever, except the assent in given terms, upon which the legislature proceeded to frame a bill; and, as I understand it, they have altogether overlooked the necessity of complying with any such terms as are contained in this assent. It is a very remarkable thing, that in the 12th section, where the general powers are given to "raise or sink rivers or streams, roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway," there is no proviso limiting the powers with respect to roads, though there is that particular proviso introduced at the end of the section, "provided nevertheless, that the said Company shall not divert, obstruct, or impound any river or water, to the prejudice of any mill or manufactory." If the legislature had meant, that this dealing with the road should be limited, there would have been some proviso of that kind;—some proviso with respect to roads, similar to that which they have thought proper to introduce with respect to rivers; but there is none such; and therefore, I think, that for the purpose of complying with the 72nd section, it was competent for the Railway Company to build a bridge at a certain height over the road as it formerly existed; and at the same time to sink the road so as to make the requisite height, which, according to the 72nd section, is to exist between the bottom of the arch of that bridge and the top of the road. I cannot therefore understand how this Court can interfere.

Motion refused with costs.

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March 16th,
17th.

Between HENRY HARGREAVES, - - Plaintiff,
and
THE LANCASTER AND PRESTON JUNCTION
RAILWAY COMPANY, - - Defendants.

A company associated for the formation of a railway, were proposing to solicit a bill in Parliament. Some communication passed between their agents and the plaintiff, as to the manner in which the railway was to interfere with a field and plantation belonging to him, situated near his mansion-house. The plaintiff understanding that the railway would not pass through a certain part of his field and plantation, and that his field would not be taken for a terminus station, took no

THE bill stated, an act of Parliament made in the 7th year of the reign of William the Fourth, incorporating The Lancaster and Preston Junction Railway Company, and conferring on them the usual powers; and stated, that by the 3rd section of the act, the Company were empowered to construct and maintain the railway, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated in the plan, and described in the book of reference deposited with the clerk of the peace, for the county of Lancaster, to commence in, at, or near to a certain close or field therein described in the borough or town of Lancaster, then or late belonging to the plaintiff, and in the occupation of T. Atkinson, as tenant. That by the 5th section, after reciting that a plan describing the line of the railway, and the land upon or through which the same was intended to be carried, together with the book of reference containing the names of the owners, lessces, and occupiers, had been deposited as therein mentioned, it was

immediate steps for opposing the bill; but subsequently, in the absence of the plaintiff from England, his agent, in answer to a notice served on the plaintiff's land steward, requiring the whole of the field for the purposes of the railway, returned a written dissent to the bill, and the plaintiff was treated as a dissenting landowner throughout the progress of the bill.

The act having passed, the Company, in exercise of the powers thereby conferred, required of the plaintiff the whole of his field and plantation.

Held, by the Vice-Chancellor, that inasmuch as the plaintiff, in the communication between him and the Company's agent, did not preclude himself from opposing the bill; and as he was, by the act of his agent, treated as a dissentient landowner, the Company were not bound by any representation made by their agents, for which they had received no consideration.

An act of Parliament for the formation of a railway, containing a declaration, that it is to be judicially taken notice of as a public act, cannot be treated or construed as a private assurance.

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enacted, that the said plan and book, should remain with and be kept by the clerk of the peace, and that all persons interested in any manner in such lands, should have liberty to inspect and make extracts therefrom, and take copies thereof; and that the said plan or book, and true copies thereof verified as therein mentioned, should be good evidence in all courts of law, or elsewhere. That by the 7th section, the Company were empowered to deviate from the line delineated in the plan so deposited: provided that no such deviation should extend to a greater distance than one hundred yards, and, in passing through any town, to a greater distance than ten yards. That by the 8th section, it was enacted, that nothing in the act contained should authorize the Company to take, injure, or damage, for the purposes of the act, any house or other building then erected or built, or any ground then set apart and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk, or avenue to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, other than and except such as are specified in the schedule to the act annexed; without the consent in writing of the owner or occupier thereof respectively. That by the 29th section, it was enacted, that for the purposes and subject to the provisions and restrictions of the act, the Company should be empowered to enter into and upon the lands of any corporation or person whatsoever, and to survey and take levels of the same or of any part thereof, and to set out and appropriate, for the purposes of the act, such part thereof as they are by the act empowered to take or use; and in or upon such lands and any lands adjoining thereto, to exercise the powers therein mentioned; and to do all other necessary and proper acts, matters, and things, which might be requisite for constructing, maintaining, altering, repairing, or using the railway and other works by the act autho-

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rized (a). That by the 32nd section, it was enacted, that the lands to be taken for the line of the railway should not exceed twenty yards in breadth, except in those places where a greater breadth shall be judged necessary for carriages to wait, unload, or load, and to turn or pass each other, or for raising embankments for crossing valleys or low grounds, or for cuttings, or for the erection and establishment of any fixed or permanent machinery, toll-houses, warehouses, wharfs, or other erections and buildings; and not above two hundred yards in any place, except at or near the terminus of the railway, unless with the previous consent in writing of the owners and occupiers of any such lands.

[The bill then stated the 63rd section, being the usual clause for the impanelling of juries, to assess the value of lands required by the Company, and the damages.]

That the schedule to the act consisted of four columns, the first of which specified the name of the owner of every particular property to which the 8th section of the act referred; the second, the name of the lessee; the third, the name of the occupier; and the fourth, a description of the property. That in the said schedule under the head "Township of Lancaster," there were in the first column the words "Henry Hargreaves, Esq.," and in the fourth, the word "plantation." That in other parts of the schedule, which have no reference to any property belonging to the plaintiff, there occurs in the fourth column the word "plantation."

That the plaintiff at the date of the passing of the act, and for several years previously, was seised in fee simple of, and now occupies the mansion house, gardens, and grounds of Springfield Hall, which are situate within the limits of

(a) The following words occur in this clause, which were not stated in the bill:—"And also to erect and construct such houses, wharfs, warehouses, toll-houses, landing places, engines, and other buildings, machinery, and apparatus, and other works and conveniences, as the Company shall think proper."

the borough and town of Lancaster, and are separated from the town street of Lancaster, only by a canal and canal bridge. That the plaintiff and his father had been at a great expense in planting or otherwise ornamenting the said premises, and in preventing or removing anything which might operate as an annoyance or nuisance to persons residing thereon. That the pleasure grounds, immediately adjoining to the mansion house, are bounded for a considerable extent towards the east, by a road leading from Cockerham to Lancaster; and on the other or eastern side of the road is a field belonging to the plaintiff, which lies partly between the said road and the turnpike road from Garstang to Lancaster. That the said field consisted partly of several small fields, which were bought for the plaintiff by his guardians, at a price far exceeding their intrinsic value, in order that they might conduce to the ornament, shelter, and protection of the mansion house and grounds: that £1,400 was paid for about two acres of land, which now form part of the field; and such purchase was made in order to prevent the ground from being built upon. That the field terminates at the northern extremity in an angle, where the two roads, between which it lies, meet. That the lodge at the end of the avenue, leading from the turnpike road into the plaintiff's park and grounds, is close to such angle, and part of the field has been planted to the extent of thirty yards, as an ornament and shelter to the house and grounds, and particularly to screen them from the view of the chimneys of certain manufactories, which were visible from the house, and also from the great turnpike road leading from Lancaster through Garstang, to the different manufacturing towns in Lancashire and to London. That the plantation is vigorous and thriving. That a part of the field at its south eastern angle, where it abuts on the London road, has been planted to the extent of twelve yards, and adjoins on the south to lands belonging to a Mr. Taylor, separated by a wall, and the south-eastern

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angle, abutting on the Cockerham road, has also been planted, and both of the last-mentioned plantations are ornamental to the mansion house and grounds. That the whole of the field, except a small part, is in the town and borough of Lancaster, and the whole thereof is assessed to and charged with all local taxes and burthens, as a part of the town of Lancaster. That the central part of the field rises to a higher elevation than the other parts, and the field declines thence on each side to the east and west, the declination on the east side being more considerable than on the west; so that if the railway passed through that part which lies to the east of the elevation, the mansion house and grounds would be in a great measure protected by the intervening elevated ground from the annoyance which the neighbourhood of a railway would otherwise occasion. That in the plan deposited with the clerk of the peace, there are delineated parts of the plaintiff's grounds immediately adjoining to the mansion house, and also the said field. That, according to the plan and book of reference, the proposed railway was to pass through that portion of the field which lies towards the eastward of the elevated part of the field, and so passing would take but a small portion of it, with the plantation at the extreme eastern angle of the field, and was to pass out on the eastern side, then to cross the Lancaster and Garstang road, and to terminate in a field on the other side of the road.

That, previous to the passing of the act, a number of persons had formed themselves into a company, for the purpose of obtaining the act, and Mr. J. Binns was employed on their behalf to survey the line of the intended railway, and he accordingly made the plans and drawings for the same, and Mr. T. Swainson was employed by them as their solicitor to obtain the act; and J. Binns and T. Swainson, previous to the application for the act, and while the same was in progress through Parliament, were and acted as agents for the Company, and of the promoters

and projectors of the railway. That the plaintiff was unwilling to give any vexatious opposition to the projected railroad, but would on no account have consented that the same should pass between his mansion house and that part of the field which lay between the higher part thereof and the Cockerham road, but he had no objection to the Company having that portion of the field which lay to the east of the high part of the field, and adjoining the Garstang road; but he would on no account have consented to the railway terminating in the field, or to the proposed Company taking more than the last-mentioned part thereof. That the plaintiff intended to have and would have opposed the passing of the bill, if it had proposed to interfere with the plantation at the northern angle of the field, or to have made the station at the termination of the railway in the field, or to have carried the railway on that side of the highest part of the field which adjoins the Cockerham road and his house and grounds, and he abstained from opposing the same on the solemn pledge and assurance of the Company, that they would not interfere with the plantation at the northern angle of the field, and would only pass through the field, and only take that portion thereof which lay towards the east of the elevated part and the plantation at the eastern angle. That on the 9th of March, 1834 (a), while the promoters and projectors of the railway were taking the steps necessary to obtain the act of Parliament, and especially procuring the assent of land owners on the proposed line, J. Binns and T. Swainson came to the plaintiff on behalf of the Company, with a plan of the proposed railroad, and stated to him, that they hoped he would not oppose the same, to which the plaintiff replied, that he would oppose the bill if they intended to bring the railway near the plantation at the northern angle of the field, and thereupon J. Binns said, that the Company

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(a) The plaintiff by an affidavit September, 1836.
corrected this date to the 22nd of

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had no such intention, but meant to keep as near as possible to Taylor's wall, (which forms the south-eastern boundary, of the field), and to cross the turnpike road near or perhaps through the plantation at the Pointer house, (which is the plantation at the eastern angle of the field), and added, that he was particularly anxious to see the plaintiff, in order to assure him that the plantation proposed to be included in the bill, alluded only to the plantation at the Pointer house; and he further stated, that he, as surveyor, could promise the plaintiff that the railroad should not, under any circumstances, be carried on that side of the hill which faced the Cockerham road; and he then drew upon the plan the direction in which the proposed road was to be carried over and through the field. That such line or direction passed through the south-eastern portion of the field, keeping at the bottom of the south-eastern side of the hill, and, crossing the London road, terminated inland on the other side of the road.

That on the faith of such assurances and promises, the plaintiff consented not to oppose, and stated, that he would not oppose the bill, provided there was not to be a station in the field. That the plaintiff in October, 1836, went to and resided on the Continent until April, 1837.

That the Company allege, that there are words and clauses in the act which entitle them to make the terminus of the railway in the plaintiff's field, and to take the whole thereof for the purposes of the railway; but the plaintiff insists, that such is not the true construction of the act; and that, even if the Company are so entitled, that they have procured the words and clauses giving them such powers to be introduced in fraud of the agreement so made with the plaintiff, and of the assurances and representations which were made to him by their agents, in order to induce him, and which did induce him, not to oppose the passing of the bill.

[The bill then stated, that, according to the printed

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copy of the railway bill, as introduced into Parliament, the Company were to be empowered to make the railway in the line or course delineated on the plan, and described in the book of reference, which had been deposited as aforesaid, and that by such plan the terminus or commencement of the railway was described as being in a close or field belonging to H. Lindow.] That at some subsequent stage of the bill, the same was altered to the effect of the third section as it now stands, and the act was finally passed with such alterations. That no notice was at any time given to the plaintiff of the alteration; and that the introduction of the words, by which, instead of commencing the railway in the close or field belonging to H. Lindow, the Company acquired the alleged right to commence or terminate the railway in the field of the plaintiff, was a fraud upon the plaintiff. That the plaintiff in fact, was not informed of the alteration so made in the 3rd section of the act, until August last, and he had abstained from opposing the bill on the faith, that the railway was not to commence in his field, but was only to pass through it. [The bill then set forth several communications in writing, between the plaintiff and the agents of the Company, with reference to an arrangement, by which a portion of the field might be left to the plaintiff, but which ended without any arrangement being arrived at.]

That on the 21st of December, the plaintiff was served with a notice on behalf of the Company. [The bill set forth the notice requiring 6 acres, 2 roods, 20 perches, of the field, and offering the sum of £1,420 for the same.] That, if the Company be allowed to carry their intention into effect, great and irreparable injury will be done to the plaintiff's mansion-house and grounds, and it will, in fact, be impossible to occupy the same as a residence with any comfort or convenience.

The bill charged, that nearly the whole of the field is within the town of Lancaster, and that the Company are

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not entitled to take more thereof than is required for the width of the railroad, and are not entitled to deviate more than ten yards from the line in which the plan, deposited with the Clerk of the Peace, represents the railroad as passing through the field.

The bill prayed, that it may be declared, that The Lancaster and Preston Junction Railway Company are bound by the promises, assurances, and representations of J. Binns, and by the agreement so made by them with the plaintiff; and that any departure from, or violation of the said promises, assurances, representations, and agreement of the Company, in executing the power given them by the said act, is a fraud upon the plaintiff; and that it may also be declared, that the plantation, at the northern angle of the field, is not subject to the provisions of the act; and that the Railway Company, their servants and agents, may in the meantime be restrained, by injunction, from entering upon, setting out, or appropriating, or using, for the purposes of the act, the plantation at the northern angle of the field, or any part thereof, or any part of the field fronting the Cockerham road, or lying between the Cockerham road and the ridge or summit of the high portion of the field, or any part thereof, which faces or slopes towards the Cockerham road; and that they may in like manner be restrained from making the commencement or termination of the railway in the said field, and from entering upon, setting out, appropriating, or using for the purposes of the Act, any part of the field, contrary to the before-mentioned promises, assurances, representations, and agreements of the said J. Binns; and that the Company, their servants and agents, may also be restrained from taking any steps, or proceeding on the said notice to assess the compensation to be made to the plaintiff for the field; and also from entering upon, setting out, appropriating, or using for the purposes of the Act, any part of the field; and that the injunction hereby prayed, may, at the hear-

ing of the cause, be made perpetual. And for further relief.

The plaintiff on an affidavit, verifying the facts stated by the bill, obtained an *ex parte* injunction from his Lordship the Master of the Rolls, who heard the motion for the Vice-Chancellor. The order restrained the Company from taking any proceedings under the notice given by them to treat for the purchase of the piece of land required for the purposes of a station.

The plaintiff gave notice of a motion before the Vice-Chancellor, to extend the injunction to the residue of the prayer of the bill. And the Company gave notice of a motion to dissolve the injunction already granted.

Affidavits were filed on behalf of the Company, denying that Mr. Binns, was the agent of or had authority to bind the Company, or that his representation was in any view binding; and denying the statement in the bill, as to what passed at the interview between Mr. Binns, Mr. Swainson, and the plaintiff, on the 22nd of September, 1836, except the statement, that on such occasion the plaintiff said, "that if the railway was carried through the south-eastern part of the field, he would assent thereto, but if carried otherwise, he would oppose it:" and asserting, that the plaintiff said in addition, that he would give his land-steward instructions to act accordingly. The affidavits on behalf of the Company also stated, that on the 19th of December, 1836, a notice in writing, which included the whole of the field, was, in pursuance of the standing orders of the House of Commons, served upon Mr. Dawson, the plaintiff's land steward; that Mr. Kirkham, an agent of the plaintiff, returned a written dissent to such notice; and that the plaintiff was accordingly returned as a dissenting landowner in all the stages of the bill. That on the 22nd of September, 1836, the exact line of the railway had not been determined on. That according to the plan of the railway, deposited with the clerk of the peace, the line passes through the

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field, but not through that portion only (as in the bill alleged), which lies towards the eastward of the elevated part of the field, but that it also passes in a transverse direction through the hill in the field, and does not pass through any part of the plantation at the extreme eastern angle. That the whole of the field and plantation at the northern angle, are comprised in the plan and book of reference deposited with the Clerk of the Peace. That it is not necessary that notice of an alteration in a line should be given to a landowner apprized of the application for a bill.

The plaintiff deposed, that he was not aware, until the month of August, 1837, that any dissent had been given in his name to the bill in Parliament, and that such dissent (if any) was given without his knowledge or directions, and that, relying upon the assurance of J. Binns, he did not give any instructions to dissent.

Both motions came on to be heard.

Mr. *Knight Bruce*, and Mr. *Russell*, for the plaintiff, submitted:—

That the Company had, by their agents, given a guarantee to the plaintiff that the railway should not, under any circumstances, deviate from the line as proposed in September, 1836. That the 3rd section of the Act provides, that the line of the railway shall be made according to the plan deposited with the Clerk of the Peace; and such plan shewing the commencement of the line to be in Mr. Lindow's field, that must be the place of commencement, notwithstanding the latter words of the section. That the field and plantation are not "at or near the termination of the railway," within the meaning of the proviso in the 32nd section, so as to enable the Company to make a station in them. That the field and plantation are in the town of Lancaster, and consequently within the protection of the 7th section. That the plaintiff having

had no notice of the alterations in the commencement of the line, had no opportunity of opposing the bill.

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Mr. *Jacob*, and Mr. *Geldart*, *contrà*, contended :—

That the statements on the bill itself, corroborated by the affidavits of the defendants, shewed, that no guarantee of any description had been given by the Company, or by their agents. That the map or plan was deposited with the Clerk of the Peace, on the 30th of November, 1836, and the Act passed in May, 1837; that the former part of the 3rd section must be qualified by the subsequent words, “to commence in, at or near to a certain close or field, now or late belonging to H. Hargreaves, Esq.” That the compulsory powers of the Company to take land, are not restricted in the manner insisted upon on behalf of the plaintiff. That the 29th section, empowers the Company to erect and construct such works and conveniences as the Company shall think proper; and that, even had the railway commenced in Mr. Lindow’s field, the plaintiff’s field and plantation were within the distance which would have rendered them liable to be taken. That the word “town” in the 7th section, contemplates land covered with houses, and, even were it otherwise, that section would not control the power to take a space for a station.

Mr. *Knight Bruce* replied.

VICE-CHANCELLOR.—In this case I consider that what *March 17th.* took place on the 22nd of September, 1836, may fairly be collected from the affidavits to be this: namely,—that there was a representation of some kind made, and that upon that representation the plaintiff said, that he would not oppose the bill. I cannot, looking at all the affidavits together, consider, that the representation which was made by Mr. Binns, and Mr. Swainson, was an absolute and

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binding representation, although I can easily understand, that the plaintiff might have supposed it to be so, and might, on the footing of that representation, have bargained to have some collateral benefit given to him by the Company. I can very well understand, that this court might, as the price of his not opposing the bill, say, that it was the bounden duty of the Company to have given him any such collateral advantage; and, in such a case, the Court would only be proceeding upon the principle which I first adopted, and the Lord Chancellor affirmed, in the case of *Edwards v. The Grand Junction Railway Company* (a). In this case, however, it seems to me, that, supposing the plaintiff did personally declare that he would not oppose the bill, it does not appear that he placed himself in a situation which prevented him from opposing it; but, on the contrary, it did happen, in some way or other, that Mr. Kirkman, acting either with or without instructions, so contrived the answer to the notice, which was sent on the 10th of December, as to place the name of Hargreaves among the list of dissents to the bill, so that the plaintiff had by the act of his agent, the benefit of opposing the bill whenever he pleased, and for any reason he might think proper. I am not satisfied with that part of the second affidavit of the plaintiff, in which he assigns his reasons why he did not act on the suggestion of Mr. Higgins, who distinctly asked him to oppose the bill: it does not appear what answer he gave to Mr. Higgins, or whether he said anything; but he proceeds to state, that his reason for not acting on the suggestion was, that he placed a perfect reliance on the representation which had been made to him in the preceding September. Now he could not have opposed the bill if he had been an assenting party; and, consequently, that statement is inconsistent with the idea that he was ignorant of the dissent. I cannot indeed but

(a) 7 Sim. 337; 1 Myl. & Cr. 640; ante, p. 173.

assume, that he understood enough of the matter to know, that, by the practice of both Houses of Parliament, the assenting, dissenting, or neutral state of every person to be affected by any proposed act is required to be communicated to the Committee of the House in which the bill originates. In other points, the statements of the plaintiff and the mistake he has made, unintentionally no doubt, shew that his memory is not much to be depended upon.

It appears, in fact, that whatever was the view which he took of the case, the plaintiff did reserve to himself, or had reserved for him, the right to dissent; and it would be singular to say, that the Company are bound by an equity arising out of their representation, for which in effect no consideration was given, for there was nothing whatever that could have prevented the plaintiff at any time after the answer had been sent by Kirkman, from making any opposition he might please to the bill. It appears strange, that he should not have been aware of a fact so generally notorious as this; namely, that those bills which are brought into Parliament, for the purpose of enabling parties to make railroads, do receive most material alterations, and not only so, but that they are actually brought into the Houses of Lords and Commons, in the most crude and immature state; and blanks are left for many things, the filling up of which would tend most materially to affect the parties whose lands are the subject of the provisions in the bill.

It appears to me, if there had been anything like common vigilance on the part of the plaintiff, he would have opposed the bill. In point of fact, however, the bill has passed, and I cannot but think, that, even if there had been a much stronger case for the plaintiff than that which he has brought forward, it would be impossible for this Court to interfere against the direct operation of the act; nothing

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collateral being sought, but merely to oppose the carrying of it into effect. This railway is a public railway, and is, according to the provisions of the act, intended to be connected with many other works in this country, of the greatest public importance. It appears to me, that it is impossible for this Court to interfere in the way asked; which is, in fact, that the railway shall not commence at the place at which the legislature has appointed it to commence. To interfere in such a way, would be in effect to repeal so much of the act of Parliament, which this Court has no power to do.

There is a case which was referred to in the course of the argument, in which it has been held, that a private act of Parliament may, for many purposes, be treated as a sort of private assurance; but that is a mere observation with respect to a family transaction, and cannot be at all applicable to the case of an act of Parliament, which, besides its general public nature manifested in every section, concludes with the legislative declaration, that it is to be taken as a public act, and judicially taken notice of as such by all judges, justices, and others.

My opinion, therefore is, that there is no case whatever by which I have any authority to interfere against the execution of the powers given by this act. The motion which is made for the extension of the injunction must, therefore, be refused; and with respect to the motion to dissolve the injunction,—the original injunction was obtained under circumstances, in which, I think, it ought not to have been obtained. I dare say it happened without the plaintiff being aware that there was that error, which it appears, as soon as it was found out, was communicated to the other side (a); at the same time it appears to me, that this Court should watch with the greatest strictness, so as to require extreme accuracy in the statement, which is the foundation of such

(a) Ante, p. 421, n.

a serious interposition against a legal right as an injunction of this Court. My opinion, therefore is, that the motion to dissolve the injunction, must be granted with costs, and the motion for the extended injunction must be refused with costs.

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Between JACOB SIMS, and WILLIAM UNWIN

SIMS, - - - - - Plaintiffs,
and

THE COMMERCIAL RAILWAY COMPANY, NASH

HILLIARD, and JAMES JOHN FROST, - Defendants.

1838.

December 9th.

THE bill stated the act for making The Commercial Railway, (*ante*, p. 375). That it was thereby amongst other things enacted, "That the same should be deemed and taken to be a public act, and should be judicially taken notice of as such, by all judges, justices, and others. That prior to and at the time of the passing of the act, the plaintiffs were, and still are, the proprietors of a rope manufactory, situate in the parish of St. George in the East, in the county of Middlesex, known by the name of "Sims's Rope Walk." That the manufactory comprizes a piece of ground of the length of twelve hundred feet in a straight line; and a covered building extending over the whole length, and proper works and machinery for the purpose of rope making, erected at each end of the piece of ground, and a dwelling-house for the manager of the works, and other machinery and conveniences; and the same is at present adapted to the manufacture of all descriptions of cordage, including the best and most expensive kinds of ropes and cables, and forms a manufactory of the first class of the kind. That the plaintiffs were and are seised of part of the said piece of ground, for an estate of inheritance in fee-simple in possession, and possessed of the remainder for a term, of which seventeen years are still

A notice, under the usual power contained in railway acts, to treat for part of a Rope walk in the line of the Railway, was accompanied by a diagram or plan of the entire Rope walk, indicating by coloured lines the manner in which the Railway would intersect it, and the portion required to be treated for, but having no scale of admeasurement appended to the diagram or plan;

Held, by the Vice-Chancellor, that the notice was sufficient.

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to come and unexpired; and unless prevented by the exercise of the powers of the act, the plaintiffs have every reason to expect and believe that they will be able to renew the lease thereof. That the proposed line of the railway lies across the line of the plaintiffs' rope walk, and under the compulsory powers of the act, the Company are authorized to take for the purposes of the act, the whole or a large part of the manufactory. That on the 14th of June, 1838, the Company caused to be served on the plaintiffs a notice. [The bill set forth the notice, dated the 25th of May, 1838, addressed to the plaintiffs, as owners and lessees of the property, stated to be particularly described in the plan thereunto annexed, informing them of the intention of the Company, to take and use the premises therein mentioned, with their appurtenances, for the purposes of the act, and calling the attention of the plaintiffs to the 20th section of the act.] That there was annexed to the notice a plan, in which certain parts were numbered 13, and certain parts were coloured black, and all the several parts numbered 13, and coloured black, were parts of the manufactory, and of the property authorized to be taken under the compulsory powers of the act; and in such plan, the proposed line of railway across the manufactory, was marked in red lines, and the parts which were intercepted between the red lines, were coloured over in red, but the parts so coloured red, did not comprise the whole or nearly the whole of the parts so numbered 13, and coloured black respectively; and no scale or admeasurement was expressed or contained in the plan. That the notice and plan did not state or shew,—and contained nothing to inform or apprise the plaintiffs with any certainty,—what parts of their manufactory were required to be taken. That on the 17th of November, 1838, the Company issued a warrant under their common seal to the sheriff of Middlesex. [The bill set out the warrant for summoning a jury, to assess and value the land thereby

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described as being part of certain land and premises, called or known by the name of "Sims's Rope Walk," and being of the width of thirty-two feet or thereabouts, from north to south, and of the length of one hundred and eighteen feet or thereabouts, from east to west, the eastern boundary being three hundred and seventy feet or thereabouts, from the southern boundary, and upon a part of which land, a covered rope walk and some small sheds or buildings are now standing.] That the Company threaten and intend to proceed under the warrant, and immediately after the value shall have been assessed, to pay or tender to the plaintiffs the amount awarded, and thereupon to enter into the piece of land described in the warrant; and it is alleged by the Company, that upon such tender and entry, all the legal estate and interest of the plaintiffs in such piece of land, will be transferred from the plaintiffs, and vested in the Company. That the whole of the manufactory is in the occupation of the defendant Frost, as tenant to the plaintiffs, and the leasehold part of the property is held by the plaintiffs of the defendant Hilliard, and that such persons are the only persons who have any interest in the property besides the plaintiffs, and they are alleged by the Company to be necessary parties to this suit.

The bill prayed, that the Commercial Railway Company and their agents, might be restrained by the order and injunction of the Court, from proceeding under the warrant; and from assessing, or procuring to be assessed, the sum of money to be paid by the Company for the purchase of the right and interest of the plaintiffs of and in the piece of land described in the warrant, or from otherwise proceeding under the warrant, or acting on the same, or paying or tendering to the plaintiff any sum of money to be assessed or awarded under the same: and might be also restrained from issuing any warrant for assessing, or procuring to be assessed, the sum

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of money to be paid by the Company, for the purchase or compensation of or for the plaintiffs' manufactory, without previous notice being given, as directed by the Act, of the intention of the Company to take or use such lands: and might be also restrained in like manner from pulling down, injuring, or interfering with the buildings standing, and being on the ground described in the warrant, or any part thereof. And for further relief.

The act contained the usual clauses, authorizing the Company to take lands, providing for the delivery of a statement in writing, by the owner of lands, required to be taken, stating the sum of money he is willing to receive for the value of such lands, and for compensation for any damages. And providing for the impanelling of juries to assess the value of such lands, and damages where the parties differ. The sections are the 9th, 20th, and 22nd.

Both sides entered into affidavits.

The plaintiffs moved for an injunction.

Mr. *K. Bruce*, and Mr. *Loftus Wigram*, for the motion. —The notice to treat, did not afford the information which the plaintiffs are entitled to, regarding the precise part of their premises which it required them to treat for. No scale is appended to the diagram accompanying the notice, by which the situation or quantity of the land required can be reduced to certainty. The plaintiffs could not, without the aid of a surveyor, form any accurate judgment as to what part of the land the Company intended to represent by that part of the diagram which is coloured red. The Company are not to proceed on a notice so indefinite, that a landowner must necessarily before he can understand it, incur the expense of a survey, by the result of which, supposing the plaintiffs to go to that expense, the Company would not be bound.

Mr. *Jacob*, Mr. *Richards*, and Mr. *Bigg*, who appeared for the Company, were not required to address the Court.

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The VICE-CHANCELLOR.—In this case, the plaintiffs would have me believe, that this diagram or plan, coloured in different colours with reference to the letter-press which is on the other side of it, did not sufficiently point out to them the quantity of land which the Company proposed to take. Not only does it exhibit the quantity intended to be taken, but its exact position, dimensions and figure. The plaintiffs, who profess not to comprehend the diagram, have, I perceive, by their affidavit in reference to the jury warrant, which only stated that the Company intended to take a certain quantity of land of such a breadth from east to west, and such a length from north to south, and to which no diagram was appended, so perfectly understood what a mere general expression in figures, as to length and breadth, represents or means, as actually to say, “that the southern boundary of the piece of land described in the warrant, is to the best of their belief, three hundred and seventy feet from the southern boundary of the manufactory.” I think, if they had chosen to cavil about the description of the land as expressed in the warrant, they might have had a good case, inasmuch as the warrant does not express the precise spot at which the land intended to be taken is to cross the rope walk; and consequently, cannot of itself express the exact statement in figures, as to the situation of the southern boundary of it. So that they admit the accuracy of that which might have been said to be insufficiently described, but dispute the accuracy and clearness of that which is represented by this diagram, and as to which no person could doubt. It appears to me, to be perfectly clear on the face of this plan or diagram, what is the quantity of land intended to be taken, and what are the dimensions, and the particular manner in which the land intended to be taken is to be cut out

and for ever maintain in good repair over the same, a good and substantial viaduct or bridge, extending over the entire present width of the street, and with a clear height thereunder, of at least nineteen feet from the present level of the same street, and shall properly fence off and guard the sides of such viaduct or bridge with sufficient parapet walls or iron railings; and shall find and provide sufficient means for carrying off the water therefrom, so that the same shall not in any manner impede, endanger or annoy passengers, or other traffic under the same.

That the town of Wakefield is a very populous town, and in the enjoyment of a great and increasing trade; and that Kirkgate-street, through which the principal part of the traffic of the town passes, forms the only exit from the town towards the south, where it leads to a bridge across the river Calder; and it is of great importance to the inhabitants of the town, and to all persons resorting thither, that the course of the said street should be preserved, free, open, and unobstructed, and that the width and dimensions thereof should be preserved and kept free from encroachment, and it was with such express view and intention, that the provision of the act lastly set forth was inserted. That it is most important and necessary for the convenience of the inhabitants of the town, and was the intention of the legislature, and the true intent and meaning of the act of Parliament, that in carrying the railway across it, the existing width of the street should not be in anywise diminished or contracted; and, in particular, that no impediment or obstruction should be created to the free passage thereof, by the placing of any buttress, pier, or other erection thereon, but that the bridge or viaduct should consist of one single arch, which should extend over the entire present width of the street, and should at all parts, and throughout the whole of the space, leave a clear height thereunder, of at least nineteen feet from the then existing level of the street, so that the

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of the whole of the premises belonging to the plaintiffs.
The motion must be refused with costs.

[The plaintiffs appealed to the Lord Chancellor, but before the appeal motion was heard the suit was compromised.]

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August, 11th,
23rd.

BETWEEN HER MAJESTY'S ATTORNEY-GENERAL
at the relation of BENJAMIN FAWCETT
and Others, - - - - - Informant,
and
THE MANCHESTER AND LEEDS RAILWAY COM-
PANY, - - - - - Defendants.

Acquiescence by the party complainant, in the erection of works, alleged to be in violation of an act of Parliament, may, before the legal question has been tried, prevent the Court from granting an injunction, which would indirectly have the effect of compelling the removal of the part of the works already built; although, in the same

case, the Court may, pending the trial at law, restrain the further proceeding with the works.

A Railway Company, as the terms of being permitted to proceed with certain works, pending a trial at law of the question whether such works were in conformity with the directions of an act of Parliament, undertook to deal with the works as the Court should afterwards direct. Before the trial had taken place, the Company, without notice to the other parties in the cause, petitioned the House of Commons for leave to bring in a bill, one of the clauses of which proposed to provide, that in all proceedings at law and in equity, the works which had been done, should be considered as a compliance with the act of Parliament, and that there should be no power at law or in equity to compel the removal thereof. The petition was received, and the bill containing such clause was introduced into the House of Commons.

Held, by the Lord Chancellor, that, although the conduct of the Company was a violation of the undertaking entered into by them, the Court had no jurisdiction to restrain them from further soliciting the bill, which having been entertained by the House of Commons, had become the proceeding of the legislature, and not of the petitioners.

and for ever maintain in good repair over the same, a good and substantial viaduct or bridge, extending over the entire present width of the street, and with a clear height thereunder, of at least nineteen feet from the present level of the same street, and shall properly fence off and guard the sides of such viaduct or bridge with sufficient parapet walls or iron railings; and shall find and provide sufficient means for carrying off the water therefrom, so that the same shall not in any manner impede, endanger or annoy passengers, or other traffic under the same.

That the town of Wakefield is a very populous town, and in the enjoyment of a great and increasing trade; and that Kirkgate-street, through which the principal part of the traffic of the town passes, forms the only exit from the town towards the south, where it leads to a bridge across the river Calder; and it is of great importance to the inhabitants of the town, and to all persons resorting thither, that the course of the said street should be preserved, free, open, and unobstructed, and that the width and dimensions thereof should be preserved and kept free from encroachment, and it was with such express view and intention, that the provision of the act lastly set forth was inserted. That it is most important and necessary for the convenience of the inhabitants of the town, and was the intention of the legislature, and the true intent and meaning of the act of Parliament, that in carrying the railway across it, the existing width of the street should not be in anywise diminished or contracted; and, in particular, that no impediment or obstruction should be created to the free passage thereof, by the placing of any buttress, pier, or other erection thereon, but that the bridge or viaduct should consist of one single arch, which should extend over the entire present width of the street, and should at all parts, and throughout the whole of the space, leave a clear height thereunder, of at least nineteen feet from the then existing level of the street, so that the

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accommodation of the inhabitants of the town, and the convenience then enjoyed by them, should be in nowise affected, diminished, or detracted from by the making of the railway. That, at the time of the passing of the act, the entire width of the street, at the place where the Company are proceeding to erect their bridge or viaduct, was sixty-five feet, of which a raised causeway or pavement for foot passengers, on the eastern side of the street, occupied a space of twenty-four feet six inches, the roadway thirty-five feet, and a raised causeway for foot passengers on the western side, five feet six inches.

That the Company are proceeding to erect a viaduct or bridge across the street in violation of the provisions of the act of Parliament; and instead of erecting a bridge which will span the entire width of the street, and leave the same open and unobstructed, they intend, and are proceeding, to erect a viaduct composed of three arches, supported upon piers or buttresses, to be erected for that purpose in the street, and which piers or buttresses they are now erecting; and according to the plan which the Company are following, and intend to abide by in the erection of the viaduct, a projecting abutment extending six feet in width, will be erected on the eastern side of the street, and will occupy six feet in width of that space, which at the time of the passing of the act was open, and part of the public street and thoroughfare, and from which abutment an arch will be thrown to a pier or buttress, which is now in the course of being erected, at a distance of seven feet or thereabouts, from the western front of the abutment, and which pier or buttress is intended to be of the width of five feet, nine inches, and will to such extent, entirely obstruct the passage of the street, and at a distance of twenty-nine feet, nine inches, from such last pier, another pier or buttress is now in the course of being erected, which will be five feet, nine inches wide; and on such two piers an arch will rest, under which the carriage-

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way will run, and at a distance of seven feet in width from the inner or eastern face of such last-mentioned pier, the Company are now erecting another abutment or buttress, which will project into and occupy four feet nine inches in width, of the former open space of the public street, and by such intended plan and proposed erections, twenty-two feet three inches in width, of the original open space and thoroughfare of the street will be blocked up, and for ever obstructed by piers and abutments, and the clear original width of sixty-five feet of the street, for passengers and carriages, will, if the Company are allowed to complete their present plan and intention, be reduced to a clear width of forty-three feet nine inches; and the carriage-way, which, before the erections, was thirty-five feet clear, will now, as measured by a straight line, between the inner faces or plinths of the two piers or buttresses, be reduced to twenty-nine feet nine inches; to the great inconvenience and prejudice of the inhabitants, and to the trade of the town of Wakefield. That the Company are proceeding to carry the intended plan into effect, and to erect such piers and abutments as aforesaid, and they have already laid the foundations thereof, and some of the said piers and abutments are already carried some feet above the ground, and thereby the nature of the plan and intentions of the Company, and the extent and measure of the obstruction to the former public thoroughfare, and the contraction of the width of the original street, have become known.

The bill prayed, that the Company, their agents, workmen, and servants, may be restrained by injunction, from proceeding with the piers, abutments, or erections, which they are now building, in or upon the said street called Kirkgate, in the town of Wakefield; and also from making or putting up any building or erection upon, or which shall occupy or obstruct any part of the ground, which, at the time of the passing of the act, was part of the open space or thoroughfare of the said street; and that they may

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also be restrained in manner aforesaid, from permitting any building or erection put up by them, which now occupies or obstructs any part of the ground, which, at the passing of the said act, was part of the open space or thoroughfare of the said street, to continue. And that they may also be restrained in manner aforesaid, from making any bridge or viaduct across the said street, which shall not extend over the entire width of the said street, as it existed at the passing of the said act, and have a clear height thereunder of at least nineteen feet from the then level of the said street. And for further relief.

By an act of Parliament, (11 Geo. 3, c. 44), declared to be a public act, and to be judicially taken notice of as such, certain persons therein named and their successors, to be elected as therein mentioned, were appointed to be commissioners for paving and repairing the streets of the town of Wakefield; and it is (s. 13) enacted, that it shall and may be lawful to and for the commissioners, from time to time and at all times, when and so often as they or any five or more of them shall think proper, and they or any five or more of them are authorized to order and direct all or any of the pavements in the streets and public passages, or any part or parts thereof, to be repaired, and when necessary, to be taken up, and the said streets and public passages to be paved, relaid, repaired, raised, lowered, or altered, and also to be cleansed and freed from all annoyances, obstructions, nuisances, and encroachments whatsoever; and all such sewers and drains, and reservoirs of and receptions for water, as the Commissioners, or any five or more of them, shall think proper; and the person or persons authorized or directed by them to do the same, are empowered and required to do the same accordingly: and by another act, (36 Geo. 3, c. 50), also declared to be a public act, and to be judicially taken notice of, it is (s. 19) enacted, that the above-mentioned commissioners may, and they are empowered to

order and direct prosecutions against any person or persons for any offence committed against the act, or for any nuisances, encroachments, or obstructions, laid, placed, erected, or made in or upon the said streets, lanes, or other public passages or places, or upon the foot pavement, within the said town or any part thereof.

Notice of a motion for an injunction having been given, affidavits were entered into by the relators and the Company.

In support of the information, W. Shaw and J. Clarkson deposed: that they had respectively filled the office of clerk to the Commissioners for paving the town of Wakefield. That the part of the street now occupied by the viaduct is sixty-five feet in width, and had to that extent been constantly repaired by the Commissioners. J. Clarkson further deposed, that in the month of April, 1838, he ascertained, that the Company had begun taking up the pavement of the street. That, having inquired of the superintendant of the works, whether the Company were empowered by their act to do this, he was answered in the affirmative; and that it was not until the 18th of July, that he became aware that the Company were not authorized to encroach on the street. He admitted in his affidavit, that he had, during the period between April and July, watched the progress of the works, and superintended the alterations of certain sewers and drains, believing, as had been represented to him, that the Company were acting according to the powers of the act. The other affidavits, on behalf of the relators, verified the several facts stated in the information.

On the part of the Company, J. Burke, one of their engineers, deposed: that in front of a shop, standing at the place where the railway is intended to cross Kirkgate Street, and which shop had been purchased by the Company, there existed a footway, bounded on the east side by a curbstone, which footway was five feet in breadth; that

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beyond the footway was the carriage or roadway of the street, bounded by a curbstone on the opposite side; that the distance between the two curbstones, was thirty-four feet six inches. That beyond the curbstone, on the east side of the street, there was a footway partially flagged, of the width of five feet, making the whole width of the street at that place, forty-four feet six inches; and that on the east side of the last-mentioned footway, and at the place where the bridge or viaduct is intended to cross the street, there was a piece of waste or vacant ground, on which there stood a cobbler's stall. That the whole extent of footway on the west side of the street was five feet; and, in setting out the viaduct, it was proposed to leave a footway of seven feet, and the same has accordingly actually been allowed. That the clear width allowed for carriage or road way under the viaduct is thirty feet six inches. That, in lieu of the footway of five feet wide, on the east side of the street, it was proposed to leave a footway of seven feet wide, and the same has accordingly actually been allowed. That the abutment, and also the pier, intended to support the viaduct on the west side, has been built partly on the former footway, and partly on the west side of the former road or carriage-way, but that, as an equivalent for the ground occupied by such pier, a commensurate piece of ground was allowed for the road or carriage-way on the east side, out of the piece of waste ground, in addition to the seven feet footway allowed on that side of the street. That, unless the piers had been so placed, so free a passage on the line of road as has now been given, could not have been allowed. It was also deposed to, that several of the street Commissioners approved of the viaduct as now erecting.

The motion for an injunction came on to be heard.

Mr. Wakefield, Mr. Jacob, and Mr. Bethell, in support of the motion—

The 43rd section of the Railway Act, in order that the existing width of the street may be preserved, imposes on the Company the necessity of crossing the street by one unbroken arch. This is not a question of relative convenience and inconvenience, but simply, of what the legislature has prescribed to be done.

With regard to the jurisdiction of this Court in granting an injunction, and as to the propriety of exercising it; assuming, that by the local act (*a*), the Commissioners are empowered to remove these buildings, if clearly creating an obstruction to the street, still they have no authority or discretion to decide, whether it be an obstruction or not; they must first prefer an indictment against the obstructors (*b*). Even were the Commissioners authorized to decide the question of nuisance, that would not exclude the jurisdiction of this Court to grant an injunction, on the application of the Attorney-General.

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Mr. *Knight Bruce*, and Mr. *Bacon*, contra—

The propriety of exercising the jurisdiction of this Court in the present case, and not the existence of the jurisdiction, is questioned.

The injunction prayed for, is of a twofold nature, prohibitory and mandatory: first,—seeking to prevent the Company from proceeding further with their works; and secondly, asking that they may indirectly be compelled to take down so much as they have already erected.

The mandatory part of the injunction cannot be granted. Although there have been cases, where, the law and the facts being clear, the Court has, before a trial at law, issued the ordinary prohibitory injunction, preventing something or some work in the first instance, there never has yet been a case in which, before a trial at law, it has issued a mandatory injunction, thereby compelling the taking down of a building already erected. In the case of

(*a*) 11 Geo. 3, c. 44, s. 13. (*b*) 36 Geo. 3, c. 50, s. 19.

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The Attorney-General v. Cleaver (a), Lord Eldon, speaking of a public nuisance, says, "that there is no instance of holding the subject-matter of complaint to be a nuisance, and therefore enjoining it without a trial." In the case of *The Birmingham Canal Company v. Lloyd* (b), the same Judge says, "The plaintiffs must establish their right to damages at law, before I ought to grant this injunction." In *The Earl of Ripon v. Hobart* (c), Lord Brougham has summed up the rule of this Court, respecting the relief by injunction in these cases, as follows (d):—"If the thing sought to be prohibited, is in itself a nuisance, the Court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably, and in itself noxious, but only something which may, according to circumstances, prove so, the Court will refuse to interfere, until the matter has been tried at law, generally by an action, though in particular cases, an issue may be directed for the satisfaction of the Court, where an action could not be framed, so as to meet the question."

Lord Thurlow says, "The general rule is, you must establish your right at law, before you bring a bill of peace" (e). In *Chalk v. Wyatt* (f), Lord Eldon granted an injunction on the express ground, that the plaintiff had previously established his right at law. *The Attorney-General v. Nichol* (g), is to the same effect. Fitzherbert in the *Natura Brevium* (h), speaking of a market, held in derogation of a franchise, says, "that if it be kept on the same

(a) 18 Ves. 211.

(b) 18 Ves. 515.

(c) 3 Myl. & K. 169.

(d) P. 179.

(e) Anon., 2 Ves. 193.

(f) 3 Mer. 688.

(g) 3 Mer. 687; 16 Ves. 338.

(h) Writ of Assize of nuisance,
A. note B.

day, it shall be intended a nuisance, but if it be on another day, it shall be put in issue, whether it be a nuisance or not."

This case may be tried without delay by indictment, at the next Quarter Sessions. The Court has jurisdiction in a case, proper for the exercise of it, to regulate the proceedings upon an indictment, and may prevent the issuing of a writ of certiorari, and compel the defendant to plead without traversing. *Attorney-General v. Cleaver (a)*, *Crowder v. Tinkler (b)*. The Commissioners of Wakefield streets have power to direct and superintend prosecutions, and, if this information is properly instituted, it is their duty to indict the Company for penalties. The Commissioners are not parties to the information,—there could be no difficulty in making them parties, however numerous. *Adair v. The New River Company (c)*.

With regard to the legal meaning of the 43rd clause, the relators seek to confine the conditional words, "so that the same should not in any manner impede, endanger, or annoy passengers, or traffic under the same," to the fencing and guarding the sides of the viaduct or bridge, with sufficient parapet walls or iron railings; but that construction is too narrow; the words relate to the whole of the clause, and to all the works to be done under it, the affidavits shew, that the viaduct, contemplated by the Company, will not impede either passengers or traffic along the street. Waterloo and Hammersmith bridges, are bridges extending over the "present width" of the river Thames, and yet they are supported by buttresses, erected in the bed of the river.

If the relators are right in their construction of the clause, it will merely render it necessary, to apply to Parliament for an amended act, to authorize the works in the way now contemplated.

(a) 18 Ves. 211.

(b) 19 Ves. 617.

(c) 11 Ves. 429.

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Mr. *Wakefield*, in reply—

The 43rd section of the act, is an express parliamentary declaration, that the interest of the public requires this viaduct to be of certain dimensions: that being so, this Court is bound to interfere, and to assist in securing to the public the protection thus specially provided, without speculating on or weighing comparative convenience or inconvenience.

It is said, that there is no instance of a mandatory injunction before a trial at law. In an early case, a party was restrained from preventing water flowing in regular quantities to a mill (a); in that case, there had been no trial at law. In *Rankin v. Huskisson* (b), the defendants were restrained from permitting certain buildings then already erected, from remaining on part of the site of Carlton Palace; and yet there had been no previous trial at law. That case also furnishes a rule for a prohibitory injunction, to prevent the further erection of the viaduct. The case of *The Attorney-General v. Cleaver* (c), was not, as this is, a case of plain palpable nuisance, but depended on the mode in which the particular trade there complained of was conducted. It was possible to regulate a soap manufactory on such scientific principles, as not to prejudice the public health: Lord Eldon said, “What is a nuisance, considered with reference to carrying on a trade, is a question of fact which it is not easy to determine.” That case therefore called for the intervention of a jury, to decide on the fact of nuisance or not. In this case, that fact has been ascertained and declared by the legislature.

The viaduct or bridge, is to extend “over the entire present width of the street, with a clear height thereunder of nineteen feet;” where is the entire width, or the clear height, if you intercept either of them with buttresses or

(a) *Robinson v. Lord Byron*, 1 B. C. C. 588. See *Lane v. Newdigate*, 10 Ves. 192.

(b) 4 Sim. 13.

(c) 18 Ves. 211.

buildings? Waterloo Bridge is not a bridge over the Thames, as it existed before the bridge and its abutments were built.

If the Company are allowed to complete this work, they will have some sort of case to ask Parliament for the amended act, which has been suggested; they will be enabled to say, that the work has been finished under the permissive cognizance of the Court of Chancery.

[The question of delay in the application to the Court, was much discussed by both sides during the argument.]

The VICE-CHANCELLOR.—It is quite impossible to decide this motion, upon the mere construction of the 43rd section. My opinion, as far as I can form one, is, that having regard to the 43rd, the 101st, and other sections, which have been mentioned, the legislature meant, that the bridge or viaduct should be so constructed, as that in whatever manner it might be made, the entire width of the street should be left clear and unobstructed. I do not see, that physically, there would be any difficulty in so constructing the bridge, as that the clear way under it might not be of the breadth of sixty-five feet, and also of the height of nineteen feet, at the least; but still, whatever may be my opinion about the construction of the clause, those who have been acting under a different sense of its meaning may say, they have a right to have a legal construction, that is, a construction by some competent Court of law, put on the clause. Undoubtedly, a case may be imagined, in which, although it might be clear that there was a nuisance in a legal sense, yet that legal nuisance might be such as not to make it requisite for a Court of Equity to interfere; for example:—supposing there was no doubt, that the construction, which I incline to, of the 43rd clause was correct, and it should appear, taking the width of the street to be sixty-five feet, that the Company had, to a certain extent, gone on erecting an archway, the clear

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width of which would fall short, by the thousandth part of an inch, of the parliamentary width, I cannot but think, that in such a case, this Court would leave the parties to their remedy at law; for though legally, there would be, practically, there would be no nuisance. Upon these affidavits, notwithstanding that it appears to me, that the width of the proposed arch will be less than was contemplated by the act of Parliament, I am not at all satisfied, that there is any real practical inconvenience likely to result from that circumstance; and the case appears to me so to stand, that there is what I may call '*injuria*,' but not '*damnum*.'

Now it occurs to me, that the Company, being obliged to finish their work within a given time, are entitled as against the public to the benefit of this circumstance; namely, that they have for a certain time gone on making their work in the way they have done, and declaring the way in which they intended to make it, without any sort of complaint having been made; and, after they have been so suffered to proceed, I think it would be unjust to treat the case, at any time before the work is finally completed, precisely in the same manner as if it had never been commenced. The Company, by going on in the way they have done, (even if it be in a manner which this Court ought to stop), have lost, by the acquiescence of the public, the benefit of the time which they are allowed for completing their work. I think this Court ought to consider how the matter has been dealt with by the persons resident upon the spot, who, as I understand the Commissioners' Acts, had the power to interfere, and might, had they pleased, have stopped the work in its earliest state. I admit that the Commissioners may not, under their acts of Parliament, have the power finally to determine what is a nuisance; yet the case, which is brought forward by the relators, is one in which, according to their own view of the law, it was competent for the Commissioners to have interfered; and, as I understand their Acts, by the authority which is there

given to them, to have effectually interfered, to prevent those works from being carried on, which have now actually been carried on to the extent stated. It is a circumstance which really appears to me to call for the discretion of the Court; for if the legally constituted authorities on the spot, who might have prevented the execution of these works, have thought proper, not merely to lie by, but actually to superintend and to direct alterations of the works, only necessary with a view to the making the viaduct in the manner proposed, it appears to me, that this Court is thereby informed that, in the view of the parties who were the conservators of the street, no practical damage will result, although there may be legal "*injuria*," from the fact of the width not being actually such as the act of Parliament prescribes. Attending to the circumstances—that, in the first place, there was, so early as November last, some species of notification as to the mode in which the Company intended to make their viaduct; that, ever since the 16th of April, works have been going on in pursuance of that notice; and that, in the month of May, the Commissioners themselves did, by their chief clerk, actually interfere with respect to the making and the alteration of the sewers; my opinion is, that it would be an extremely strong measure for this Court now to say, that the practical inconvenience must be assumed to be so great, as that the Court ought at once to interfere to prevent the further prosecution of these works, more especially when, as I understand the Commissioners' Acts, there is nothing whatever to prevent the Commissioners from, in a peaceable, quiet, and lawful way, actually removing the nuisance of which they complain, in the same manner as they might cause any heap of rubbish or quantity of stones that might be thrown down by any person to be removed. There may be more practical difficulty in removing large than small masses of stone, but it is the same difficulty in kind, differing only in the degree. It seems to me that what ought to be done in this case is not to grant any in-

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junction; but, as the Company are desirous that the question of law should be tried, to let the question be tried in any manner which the relators think proper to adopt. Any of the relators, for instance, may attempt to abate the nuisance, and the question of law will soon be determined. I certainly think that the right course for me to adopt is not to interfere further at present than to declare that it shall be competent to the relators, or those who represent the public, to take such steps as they may think proper, either for abating the nuisance, or determining the legal question. There appears to me to be an objection to sending a case for the opinion of a Court of law, as I should merely have the dry construction of a Court of law on the act of Parliament; but I wish to learn something more about the practical mischief.

The minute of the order drawn up by His Honor was as follows:—

Enter the affidavits as read;—no order for an injunction at present: but the relators are to be at liberty to take such proceedings as they may be advised;—liberty to apply and reserve the further consideration of the motion, and costs.

The relators applied to the Lord Chancellor for an injunction. The motion was heard at his Lordship's residence.

Mr. *Wakefield*, Mr. *Jacob*, and Mr. *Bethell*, for the motion.

Mr. *Knight Bruce* and Mr. *Bacon* contra.

The arguments were substantially the same as before the Vice-Chancellor.

THE LORD CHANCELLOR.—In this, as in all other cases where the injunction of this Court is sought for the purpose of preserving a legal right, the Court is very much in the habit, always I believe, of enabling the parties to try the question

at law. The interposition of this Court is only consequent upon a legal right. I have no difficulty, therefore, in saying that the matter must be put into a course of legal trial. The fact is asserted on the one side to be one way, and on the other side to be the other way. The rights of the parties depending upon the act of Parliament must be decided at law; and it happens, that there will be no difficulty in getting a very speedy trial at law. It appears to me that the best course of trying the question at law, is, for the Company to bring an action against some one of the relators for removing what has been built, and which the relators complain of; the relators admitting, for the purposes of the trial, that they have removed the subject of the complaint. The action should be so framed as to try not only the question which applies to the western side of the street, but the other question raised, namely, how far the pitched pavement is protected as forming part of the street. The only remaining consideration is, what in the meantime is to be done with regard to an injunction? The relators contend, that the obstruction on the west side should be ordered to be removed, and the Company, that there should be no injunction at all. Now, as far as the public are concerned, the obstruction has existed from the month of April last, and I do not think that there is any case made for the extraordinary interposition of this Court; for undoubtedly it would be an extraordinary interposition of this Court to order an erection of this nature to be removed. I think I may allow these works to be left in the state they have been in since the month of April, until I am better informed of the rights of the parties by the result of a trial. With regard to the other part of the injunction prayed,—if the Company will come under an undertaking which I am about to propose, I will not grant that; but I must have entire jurisdiction over these works preserved to this Court. The Court must have the same power of dealing with the works of the Company as it has at the present moment, when it

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has the power of altogether preventing the Company going on with them. What I propose is, that there shall be no injunction, the Company undertaking to remove all works and erections upon or over any portion of the street, and according as the Court may direct at any future time. If the Company will come under this undertaking there shall be no injunction.

Let the motion stand over, the Company undertaking to remove any works or erections upon or over any part of the street, or otherwise to deal with the same as the Court shall direct, and also undertaking to bring an action immediately.

The counsel for the Company entered into the above undertaking.

It was also arranged that the venue in the trial should be laid in Middlesex.

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On a motion supported by Mr. *Knight Bruce*, Mr. *Bacon*, and Mr. *Tomlinson*, and opposed by Mr. *Wightman* and Mr. *Bethell*, the action was directed to be tried at York instead of in Middlesex. Considerable discussion also took place as to the frame of the pleadings at law.

On the meeting of Parliament for the session of 1839, the Company presented a petition to the House of Commons for leave to bring in a bill for amending the act of the 6 & 7 Will. 4; and a bill was subsequently introduced into the House of Commons without any formal notice thereof having been given to the relators in the above suit; the 18th section of which, after reciting the 43rd section of the former act, and reciting that the Company had made and constructed a good and substantial viaduct, extending over the then entire width of Kirkgate Street, and a considerable distance further on each side thereof, which viaduct, so far as the same extends over the street, is formed by an opening of thirty feet wide being left for the carriage-way, and an opening of seven feet wide on each side thereof for

a footway, each of which openings is of the clear height of nineteen feet from the level of the street to the under side of the horizontal bearings for supporting the railway, laid upon perpendicular abutments and piers placed on each side of and between such openings; and reciting, that doubts had arisen whether the viaduct so formed was in all respects conformable to the requirements of the first act, proposed to enact, that the construction of the viaduct in manner and form aforesaid should be deemed a sufficient compliance with the directions of the first-mentioned act of Parliament, and that the Company should not be compelled or compellable, by any proceedings at law or in equity, to take down or alter the viaduct or any part thereof; provided always, that nothing therein contained should in any other respect prejudice or affect any proceedings at law or in equity already commenced and then pending with respect to such viaduct, or the costs thereof.

The relators moved, before the Lord Chancellor, that an injunction might be now granted in conformity with so much of the previous notice of motion given in this cause, as prayed that an injunction might be awarded against the defendants to restrain them from permitting any building or erection put up by them which now occupies any part of the ground which, at the time of the passing of the act of the 6 & 7 Will. 4, in the information mentioned, was part of or comprised in the open space or thoroughfare of the street called Kirkgate, in the town of Wakefield, in the county of York, to continue; and also that the defendants might be restrained from making any bridge or viaduct across the said street which shall not extend over the entire width of the street as it existed at the time of the passing of the act, and have a clear height thereunder of at least nineteen feet from the then level of the said street until &c., or if his Lordship shall not think fit to grant such injunction, then that such other order may be made for the purpose of securing the jurisdiction of this honourable Court over the subject-matter of the suit, and

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restraining or preventing the undertaking or agreement given or entered into by the defendants on the occasion of the order made by the Lord Chancellor in pursuance of the said notice of motion, from being annulled or defeated; or for securing the decision of this cause upon the merits existing at the time of the making of the last-mentioned order, as to his Lordship shall seem meet.

Mr. *Wakefield*, Mr. *Jacob*, and Mr. *Bethell*, in support of the motion, submitted, that the application to Parliament having been made without notice to the Attorney-General or to the relators in the above suit, and without the sanction of the Court, was a direct breach of the undertaking entered into by the Company, upon the faith of which the injunction, restraining the completion of the viaduct works, had alone been withheld. That the Court had jurisdiction to restrain parties from applying to Parliament. *Ware v. Grand Junction Waterworks Company (a)*.

Mr. *Knight Bruce* and Mr. *Bacon*, *contrà*,—said, that the privilege of applying to Parliament was one which this Court, not having jurisdiction to restrain, had never contemplated restraining; that it was in the power of the relators to oppose the clause in Parliament; that no case had gone the length of deciding that a subject of this country could be restrained from petitioning Parliament. They cited *The Mayor &c. of King's Lynn v. Pemberton (b)*. They also mentioned the case of “*qui tam*” actions brought to recover penalties against clergymen for non-residence, to stay which a special act of Parliament (c) had been passed. The Court would still be enabled to deal with the costs of the suit.

Mr. *Wakefield* replied.

(a) 2 Russ. & Myl. 483.

(b) 1 Swanst. 244—252.

(c) 41 Geo. 3, c. 101. See 43 Geo. 3, c. 84, ss. 1, 2, 3.

The LORD CHANCELLOR.—I must say, I think that the attempt to procure the passing of this clause is a direct breach of the undertaking which the parties entered into with this Court. When the case came before me I had nothing to do but to look to the rights of the parties as they then existed. I found that the Company had erected works to a certain extent, and that those works had been permitted by the relators to exist in that state for a certain length of time. The Company had not completed the works to the extent of answering the purpose for which they were intended, because they had not proceeded so far as to carry the viaduct over the street. I thought it was a case which ought to be the subject of a trial at law; and it is quite obvious, that, in this, as in all other cases of the kind, when a trial of law is to take place to ascertain a legal right, what the Court has to consider, is, whether there shall be an injunction in the meantime. In this case I should undoubtedly have compelled the parties to leave the works in the state in which they then were, unless they had come into an undertaking which would place their opponents precisely in the same state, after the result of the action, as they were in at the time that the application was made to me. Now why did I not do that? Because the parties undertook, that if I did not interfere with the prosecution of their works, and the completion of the viaduct which they had commenced, I should have the same jurisdiction over the subject-matter, after the result of the action was known, as I had at that moment; that is to say, I should be at liberty to deal with the work complete as I could at that moment have dealt with the work incomplete. In terms that was the meaning of the undertaking; it was the ground upon which they obtained my acquiescence in their being permitted to go on pending the inquiry at law.

If the parties had given their opponents notice, that they intended to apply to Parliament to relieve themselves from

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the difficulty in which they found themselves placed, or, even if they had in the proposed clause (which would have come to the same thing) stated to the Houses of Parliament what had taken place, then neither House of Parliament would have thought of proceeding without bringing before it those who were the parties litigant; no objection could be made to that course,—certainly none upon the ground of an attempt to gain an advantage over their opponent. But I do not find, that this clause gives either House of Parliament the slightest intimation of what had taken place; on the contrary, looking at it in the words in which it is framed, any person would suppose, that there was a viaduct constructed more beneficial than the one contemplated by the original act; but for some reason or other, not explained, not exactly in conformity to it. The clause states the original act to have required a bridge over the then entire width of the street: it states, that the Company “have constructed a substantial viaduct, extending from the then entire width of such street, and to a considerable distance further on each side;” so that the only objection to the viaduct, according to what is stated in this clause, is, that it is a better viaduct, more extensive, and therefore more beneficial to the public, than that which, by the original act, the Company were compelled to make,—then it provides, that in all proceedings at law and in equity, what the Company have done, shall be considered as a compliance with the provisions of the act, and that there shall be no power, either at law or in equity, to compel them to take down that which they have erected: that is to say, having entered into an undertaking or contract with the Court, that in a certain event they would take down that which the Court might think ought to be taken down, they, without any communication to their opponents,—communication to the Court was not necessary, as it is only for the purpose of carrying into effect the rights of the parties, that the Court has anything to do with it;—but,

without communication to their opponents, they endeavour to obtain a legislative enactment, making that a compliance with the act of Parliament, which, if the clause is of any value at all, was not so in itself; and depriving this Court of jurisdiction to do that, which by contract they undertook the Court should have power to do. If this clause were to become law, it is quite obvious, that this Court would be entirely disarmed of all authority. I do not see how it could punish the parties for a contempt, because it never could make an order for commitment: the Court would be prohibited from ordering them to do anything with regard to the existing erections, and, if this Court could not do anything, with regard to the existing erections, it could not put the parties into contempt, for not doing that which it had not directed to be done. It would not be easy for this Court to say, that obtaining the act of Parliament was a contempt.

Under these circumstances, I think, that the course which has been adopted, is one which ought not to have been taken; and it is one, which will prevent me in future from giving much credit to what parties undertake. If, unfortunately, I can find no remedy for this, it will compel the Court to deal with parties, who are brought before it, with an extremity of harshness, which, perhaps, the strict rules of the Court may sometimes impose; because, it will be impossible for the Court to trust to anything, except to the strict letter of its orders. The way to try the propriety of this proceeding is by supposing that, at the time I made this order, I had been told, "Make that order if you please, but we shall apply to Parliament next session, to make this work which we are erecting, a work in compliance with the terms of the original act, and prevent this Court from interfering with it." I could not have objected to their so applying to Parliament, but I should have made a different order from that which I did make. I should, at least, have prevented them from going on with the work,

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until the question of right was ascertained. They obtained a benefit by holding out, that I should be permitted to deal with the works, when erected, in the same way as if they remained in the then existing state; and then they endeavour to obtain the authority of Parliament, to prevent me from carrying into effect the undertaking they gave.

Of the conduct of the parties, and as to what ought now to be the course of proceeding, I have no doubt; but I have very great doubt, as to the mode of carrying it into effect. That I must take into consideration. I do not feel, that I can interfere in the present state of the proceedings. Whether I might have done it before the party had applied to Parliament, is a matter that I do not go into. It will require great consideration, before this Court will prevent people from petitioning the Houses of Parliament. That is the first proceeding; but when they have petitioned, and either House has entertained the bill, it becomes the act of the House, and not the act of the party. No case has been cited to me, which would shew that I have that power without reference to property;—the cases, where the Court has interfered to prevent the application of funds, are a different matter: they are collateral to the question. No case has been cited, in which this Court has interfered to restrain parties from petitioning Parliament, or applying to Parliament for any law which they supposed would be granted: unless a very strong authority is produced for that purpose I should be disinclined to assume that jurisdiction. However, it is a question of considerable importance; not so much in this particular case, as with regard to the mode in which this Court will be compelled to deal with parties hereafter. And I cannot part with it, without taking it into consideration, in order that I may lay down some rule, by which these evils may be avoided in future.

Mr. Knight Bruce, as counsel for the Company, stated,

that it had been confidently expected by both parties, that the action would have been decided at law before the meeting of Parliament. An application to the Court, for the regulation of the trial had been made in January (a) last; and pleadings of considerable length had been prepared. These facts shewed, that there could not have been any intention to apply to Parliament at the time when the undertaking was given.

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The LORD CHANCELLOR.—I am quite sure, it was not so intended by the Counsel who gave the undertaking.

Mr. *Knight Bruce*.

No, my Lord, nor by any other person. I beg, also, to remind your Lordship, that it was distinctly mentioned whilst the case was being argued, that probably the Company might apply for an amended act of Parliament, in regard to the construction of the viaduct.

[The clause was abandoned by the Company, whilst the bill was in committee in the House of Commons.]

Between DAVID ROBERTSON, and Others, - Plaintiffs,
 and
 THE GREAT WESTERN RAILWAY COMPANY, Defendants.

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 Nov. 13th.

THE bill stated the title of the plaintiffs to a freehold estate, situate in the parish of West Hendred, in the county of Berks, which was under a lease to Robert Smith, who was then in the occupation thereof, as tenant. That by an agreement, dated the 5th of December, 1838, made between The Great Western Railway Company, by D. Lousley, their agent, and an agent of the plaintiffs, a

A bill was filed by a vendor against a purchaser; averring, that before completing the contract the purchaser had entered on the land, and praying a specific performance, and in the meantime an

(a) Ante, p. 452.

injunction to restrain the defendant from entering on, or continuing to hold the premises.

Held, that a tenant of the land contracted to be sold, is not a necessary party.

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portion of the said estate was contracted to be sold to the Company, for the sum of £230; and thereby, amongst other things, it was agreed, that the vendors should satisfy all the demands of the tenant. That several communications passed between the solicitors for the Company and the solicitor of the plaintiffs, respecting the title to the land contracted to be sold; and, that the Company had entered thereon without having paid the purchase money. The bill then set forth a notice, dated the 30th of July, 1839, addressed by the plaintiffs to the Company, desiring them not to trespass on the land, until the purchase should have been completed. That R. Smith, the tenant, had on the same day served a similar notice on the Company. The bill prayed a specific performance of the agreement by the Company, the plaintiffs offering to perform the same on their part, and that in the meantime the Company might be restrained from continuing to hold possession of, and from entering upon the land. And for further relief.

The Company demurred, and for cause of demurrer shewed, that R. Smith is a necessary party to the bill, but the complainants have not made him a party.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stevens*, for the demurrer.

The tenant has served on the Company a notice similar to that of his landlord, and an action may be going on against the Company, over which the Court has no control. A Court of Equity does not allow a party to be subjected to two proceedings for one cause of action.

Mr. *Wigram*, and Mr. *W. C. L. Keene*, for the bill.

This is a bill for a specific performance, to which the vendor and purchaser are the only necessary parties. The tenant has no privity in respect of the contract, and no decree can be made against him. *Humphreys v. Hollis* (a), *Tasker v. Small* (b).

(a) Jacob, 75.

(b) 3 Myl. & Cr. 63; 6 Simons, 633.

Mr. *Knight Bruce* in reply.

The suit has two objects; a specific performance and an injunction. If the bill had prayed the former only, the tenant need not have been a party; by asking an injunction to restrain the trespass, he becomes a necessary party.

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The VICE-CHANCELLOR.—In this case, the subject-matter of the suit is one,—the injury is one,—and the party committing the injury is one, but two persons are affected by that injury. I therefore am of opinion, that this Court cannot deal out justice in this case, without having before it both parties affected by the trespass.

Demurrer allowed.

The plaintiffs appealed.

The LORD CHANCELLOR.—The order allowing the demurrer is wrong. If a practice of such a nature were to prevail, it would cause great impediments to the suitors of the Court, and be productive of much inconvenience and expense. It is not now necessary, that I should say what my opinion would be if the case were one of mere trespass; although I certainly have a strong opinion on that point; but it is a new doctrine, that to a bill for a specific performance and injunction, you cannot get intermediate relief, without having before the Court every person who may be affected by an injury committed on the subject-matter of the contract. The owner of an estate has agreed to sell it—whether to a Railway Company or not is immaterial,—and he seeks an equitable performance of that agreement: the Company have not paid the money, but have entered and are dealing with the property in a manner that may or may not affect the tenant; to say that the plaintiff cannot restrain this without bringing the tenant before the Court, is to exclude the jurisdiction of the Court.

Dec. 5th.

Demurrer overruled.

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May 10th,
Dec. 23rd.
1836.

Between THE RIGHT HONORABLE WILLIAM
HENRY FRANCIS LORD PETRE, - Plaintiff,
and
THE EASTERN COUNTIES RAILWAY COMPANY,
JOHN CLINTON ROBERTSON, HENRY
BOSANQUET, SIR ROBERT ALEXANDER,
LOUIS DESANGES, WILLIAM GUNSTON,
HENRY LUARD, and WILLIAM TITE, - Defendants.

The Committee of certain subscribers, applying for an act of Parliament, to authorize the formation of a railway, entered into an agreement with the plaintiff, a Peer of Parliament, through whose estates the railway was intended to pass, that, in consideration of his withholding his opposition to their bill, the incorporated Company, in the event of the railway being, under the

THE bill stated, that the plaintiff is now, and was prior to the transactions after mentioned, the owner of certain messuages, lands, and premises, in certain parishes in the county of Essex. That the defendants Bosanquet, Alexander, Desanges, Gunston, Luard, and Tite, and other persons, were applying for an act of Parliament to establish a Company for making a railway, to be called "The Eastern Counties Railway Company," and had adopted the usual means for obtaining such act, and among other things, had appointed the last-named defendants as a Committee of Management, with power to do all necessary acts, and to enter into all such arrangements as might be necessary for forwarding such object. That a certain deed was executed, by which such last-named defendants were empowered, among other things, to make such agreements powers of their act, made to pass through the plaintiff's estates, in the line laid down on their parliamentary plan, should, previous to entering thereon, pay to the plaintiff the sum of £120,000 for the value of the land, and for compensation; and that the Company should, within three weeks after their incorporation, ratify the agreement.

The plaintiff withheld his opposition to the bill, and it passed into an act.

The incorporated Company refused to ratify the agreement; and being empowered by their act to take compulsorily the plaintiff's land in the line mentioned in the agreement, served on him a notice to treat for the same.

The plaintiff having filed his bill, obtained an injunction, restraining the Company from proceeding to assess the value of such land:—and the injunction was afterwards continued, notwithstanding the tender of an undertaking on the part of the Company, not to enter on the land until the further order of the Court; and notwithstanding the time, during which the Company were authorized to take lands for the railway, would have expired before the hearing of the cause.

or arrangements with landowners and other persons, as they might consider necessary or expedient for obtaining the act of Parliament. That Messrs. Blunt, Roy, Blunt, & Duncan, were appointed to act as the solicitors and agents of the intended Company.

That upon the promulgation of the scheme, it appeared from the plans published and deposited, according to the standing orders of Parliament, that the line of railway was projected to pass over the estate of the plaintiff, and within a short distance of his mansion-house, called Thorndon Hall, encountering in so doing serious engineering difficulties. That the plaintiff's estate is an ancient family estate, and has for many generations belonged to his family, and Thorndon Hall was entirely rebuilt by the plaintiff's grandfather, at an expense of upwards of £250,000, and the plaintiff and his family reside there during nine months in every year. That the line of railway was projected to pass in front of the mansion-house, and within view from the windows of all the principal apartments, and inconveniently to cross and intersect the road and principal approach to the house from the town of Brentwood. That the railway was also projected to pass through a private plantation of the plaintiff's, of about eighty acres, situate within view of the mansion-house, surrounded with high gates and fences, and abounding with ornamental timber, and turf walks and drives, which the plaintiff and his family are in the habit of using for their private recreation, thereby inconveniently separating one part thereof from the other; and was also projected to pass over certain farms the property of the plaintiff, on the south side of the turnpike road leading from London to Chelmsford. That such farms, as well from their situation as from the excellence of the soil, are amongst the most valuable farms on the plaintiff's estate, and they were intended to be crossed and cut through by the railway, to the extent of five miles, leaving a strip of land between

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the railway and the turnpike road, cut off from the adjoining part of the estate; and the farms were intended to be severed in a most injurious manner, they being in many cases to be separated from the farm-houses and homesteads, and in one instance of a valuable farm called Margaretting Hall, the railway was intended to pass directly through the farm-yard, within a few yards of an excellent residence standing thereon, on the one side, and the parish church on the other. That having ascertained the nature and extent of the inroad, which was proposed to be made on his estate, and on the privacy of his residence, the plaintiff directed his solicitors Messrs. Few, Hamilton & Few, to oppose the bill, which had been introduced into Parliament, for authorizing the project. That the construction of the railway in the route aforesaid would have ruined Thorndon Hall as a family residence, and would have made such an inroad on the plaintiff's pursuits on his estate, and his enjoyment thereof, that he would certainly have quitted it for some other residence. That he directed his solicitors to cause the neighbouring country to be surveyed, in order to ascertain whether the railway might not be carried by some other route further from his residence, with equal advantage to the public; and accordingly Mr. G. Leather, an experienced engineer, was employed to make such survey, and having done so, gave his opinion, that another route could be taken on the northern side of the turnpike road, without encountering greater engineering difficulties, and without interfering with any private residences or ornamental property. That the line suggested by Mr. Leather is hereinafter called the Writtle line, and that originally proposed the Thorndon line. That the Thorndon line, after passing over the estate of the plaintiff to the extent aforesaid, entered upon an estate called Hylands, belonging to Mr. Labouchere, encountering, in so doing, serious engineering difficulties, and crossing and cutting through the same to the extent of one mile; and, in the opinion of Mr. Labou-

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chere, the same would have caused very great damage to his estate, and would have interfered unnecessarily with his residence and ornamental property. That, in the early part of 1836, a bill was brought into the House of Commons to authorize the construction of the railway, and preparations were thereupon made by the plaintiff's solicitors for opposing the same, and a petition was prepared and signed by the plaintiff and Mr. Labouchere, and by many of their tenants and other persons, against the bill, and evidence was being prepared to be submitted to a Committee of the House of Commons to prove the matters hereinbefore mentioned. That it, therefore, became an object of great importance to the Committee of Management of the undertaking to induce the plaintiff and Mr. Labouchere to withdraw their opposition to the bill, and many applications were made by them to the plaintiff to induce him to do so, but he was unwilling to listen to any proposal which would not relieve his estate from being intersected by the railway in the manner proposed by the parliamentary plan. That the proposed Company expressed a desire to accede to the wishes of the plaintiff, if possible; and, pursuant to an arrangement, a meeting took place at Brentwood on the 2nd of April, 1836, between Mr. Braithwaite, the engineer of the Company, Mr. Duncan their solicitor, Mr. Few, Mr. Coverdale the land agent of the plaintiff, and Mr. Lawford, the solicitor of Mr. Labouchere, when Mr. Braithwaite admitted that the Writtle line was practicable, and better in respect of gradients than the Thorndon line. That, upon that occasion, both Mr. Braithwaite and Mr. Duncan assured the other parties that the Thorndon line should not be taken, and Mr. Duncan offered to have a clause inserted in the bill to that effect. That the result of such meeting having been communicated to the plaintiff, he, on the faith of such admission and offer, authorized his solicitors to discontinue his opposition to the bill. That the following letter was sent by Mr. Duncan to Mr. Few:—"4th of

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April, 1836—Sir,—The Committee have directed Mr. Braithwaite to survey the line by Writtle. If he reports favourably, and if Lord Petre and Mr. Labouchere agree to assent to this new line, and not to countenance any opposition from the other owners and occupiers, and if we can satisfy ourselves, as I believe we shall be able to do, that, upon this line, no opposition of an expensive or impregnable character would be manifested, then the Committee will bind themselves under a heavy penalty, in the most effectual manner, not to go upon, or take his Lordship's property upon that line, without his assent in writing, thus driving the Company to apply, in a subsequent session of Parliament, for an amended act to make the proposed deviation by Writtle. It would be most obnoxious and dangerous to the bill, as you, on consideration, must feel, to make this arrangement a clause in the bill itself; and I therefore trust the usual mode of affecting such an arrangement, by a bond with heavy penalty, will be satisfactory: it must be understood that the arrangement is to be entirely one of a secret, confidential, and private nature; and, in case of its not being carried into effect, neither this letter, nor the negotiations which have led to it, are to be in any manner used in Parliament." That the Writtle line is a practicable line, and that the plaintiff and Mr. Labouchere were both assents thereto, and discontinued all opposition to the bill, and there would not have been any opposition of an expensive or impregnable kind, and no such opposition would have been encountered or such damage done upon that as in attempting to carry the Thorndon line. That Mr. Few was unwilling to consent to such arrangement without the security of a clause in the bill itself, and took the opinion of counsel on the proposition of a bond in lieu thereof, and being advised that it was liable to objection, requested copies of the parliamentary contract and subscribers' deeds of the proposed Company, in order to form an opinion on the subject. That, upon the advice of counsel, it was de-

cided that an agreement should be entered into to effect the above purpose; and Messrs. Few, on the 20th of April, 1836, forwarded to Messrs. Blunt a draft agreement, accompanied by a letter, stating that it must be approved of by the Committee before the 23rd, otherwise the petition against the bill would be presented. That, on the 23rd, the draft was returned with the following accompanying letter from Mr. Duncan:—"I return you the draft, and have selected the six most responsible men in the direction as parties. If you will send me the engrossment, all parties are in town, and can sign it at once. I hope Mr. Coverdale's statement, that there are not any opposing owners on the altered line is true, for it has been hitherto impracticable to investigate the matter." The bill then set forth the agreement in question, dated the 25th of April, 1836, duly executed and made between the defendants Bosanquet, Alexander, Desanges, Gunston, Luard, and Tite, therein described as the Committee of Management of the said undertaking, of the first part, and the plaintiff of the second part, whereby, after reciting the proposed line of the railway; the injury to be thereby occasioned to the plaintiff's estates; that the plaintiff had determined to oppose the bill, and had suggested the adoption of another line intersecting various other of his farms; that the altered line would not be productive of the same injury to the plaintiff as the present intended line, and would not therefore be objected to by him; that it was considered by the plaintiff, that the value of his estates which it was then proposed to take for the purposes of the railway amounted to 20,000*l.*, and the injury thereto to 100,000*l.*; and that, in order to induce the plaintiff to withhold his opposition to the bill, the parties of the first part had agreed in their public and private capacity to enter into the covenants after contained;—it was witnessed, that, in consideration of the agreements after contained on the part of the plaintiff, the parties of the first part, acting by virtue of the powers vested in them

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as members of the Committee of Management aforesaid, and so as to bind the intended Company, and all the subscribers to the undertaking, and all monies subscribed, or to be subscribed, for the purposes thereof, and the income of the Company, and also acting in their individual capacity, so as to bind their respective estates, did jointly for themselves, and each of them severally for himself and their and his heirs, executors, administrators, and assigns, covenant with the plaintiff, his heirs and assigns, that, if the Company should be incorporated, and should under the powers of their act enter on the estate of the plaintiff, lying on the south of the turnpike-road from Romford to Chelmsford, the Company would pay to the plaintiff, his heirs or assigns, the sum of 20,000*l.* for the value of the premises to be taken, and the sum of 100,000*l.* as a compensation for the injury to the estate of the plaintiff; and that such payment should be made before any works should be commenced on the said estate in pursuance of the act. The indenture then, after stipulating that no station or building should be erected on the estate of the plaintiff, proceeded to provide, that, within three weeks after the passing of the act, the Company should, by an instrument under their common seal, ratify and confirm this agreement, so as to bind the Company. And it was also witnessed, that, in consideration of the covenants hereinbefore mentioned, the plaintiff agreed that he, as a landowner on the proposed line of railway, would withdraw his opposition to the act. Provided, that nothing therein contained should prejudice or affect the right of the plaintiff, his heirs or assigns, to avail himself or themselves of the benefit of the provisions to be contained in the act for the protection of owners of lands which should be contiguous to the line of railway, save only that the value of the land to be taken, and the compensation for the damage done to the estate of the plaintiff, should be considered as finally settled by these presents."

[The bill then averred the truth of the statements con-

tained in the above deed, and the authority of the parties thereto to enter into the same.]

That, upon the execution of the said indenture, all opposition to the bill on the part of the plaintiff and of Mr. Labouchere, with whom a similar agreement had been entered into by the same parties, was withdrawn, and the bill received the royal assent on the 4th of July, 1836, and became an act of Parliament; and thereby certain persons, including the above-named defendants, were incorporated by the name and style of "The Eastern Counties Railway Company," for the purposes in the act mentioned; with perpetual succession, and a common seal. That, shortly after the passing of the act, and on the 26th of July, 1836, Messrs. Few sent to Messrs. Blunt a draft of a deed of confirmation of the above agreement, but did not receive any answer thereto until the 10th of October, 1836, when the following letter was received by them from Messrs. Blunt:—

"Having placed before the Board of Directors your letter, we are desired to state, that the Board declines to allow the seal of the Company to be put to the agreement on behalf of Lord Petre, finding it impossible, against the feeling of the surrounding country, to carry the suggested line by Writtle. The Directors, however, are most anxious to make the present line as agreeable and beneficial to his Lordship and his tenants as possible, and trust, that, without litigation, terms of arrangement acceptable to both parties may be made."

That the receipt of the last letter, which was more than three months after the passing of the act, was the first intimation to the plaintiff, that the Company did not intend to ratify and confirm the above agreement, and Messrs. Few thereupon addressed to Messrs. Blunt the following letter, dated the 18th of October, 1831:—

"We have informed Lord Petre that he must rest satisfied with the compensation covenanted to be paid to him by the deed of the 25th of April."

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That Messrs. Blunt replied by a letter dated 25th of October, 1836:—

“ We are requested by the Board to state, that in order to prevent mistakes, they point out to your attention, that the Board has declined to adopt the deed of the 25th of April last: the regular course is, for Lord Petre to comply with the notice which has been served upon him.” [The bill set forth the notice referred to, dated the 8th of October, 1836, being in the usual form of notice to treat for land proposed to be taken under the powers of railway acts, and requiring the plaintiff, within one calendar month, to set forth the particulars of his estate, and interest therein, and the amount he was willing to receive for the value thereof, and for compensation for any injury or damage occasioned to the rest of his estate, by the taking of the part required.]

That on the receipt of the last letter, Messrs. Few addressed a letter to Messrs. Blunt, dated the 31st of October, 1836, requesting to be explicitly informed, whether it was the intention of the Company, or of the parties to the deed of agreement, to dispute the validity of that instrument. That on the 1st of December, 1836, Messrs. Blunt answered as follows:—

“ The gentlemen who signed the agreement, have requested us to state, that they cannot interfere in the matter, but must leave it in the hands of the Board, who refer you to their letter of the 28th ultimo, to Lord Petre.”

That the letter referred to was left at Thorndon Hall by C. Robertson, the secretary to the Company, and a defendant hereto, and after alluding to the fact of the service of the notice, of the 8th of October, and stating that the Company did not wish to take any advantage of the time specified in the notice having elapsed, stated, “ that the Board had been indirectly given to understand, that because they declined to confirm by their common seal the agreement of the 25th of April, by which certain confessedly penal sums were covenanted to be paid in the event of the line being carried in

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direction prescribed by the act of Parliament, his Lordship was under an impression, that the Board refused to hold the Company responsible for the acts of the Provisional Committee, begged to assure him, that the fact was quite the reverse, and that one of the first proceedings of the Board was formally to recognise the engagements of that Committee, and that to the utmost which justice or equity or honour could require, those engagements should be fulfilled; but, that the Board declined to ratify the agreement for the reason that, subsequently to the date of it, circumstances had come to light, well known to his Lordship and his agents, which completely annulled the considerations on which it was founded, and, therefore, that it would be futile to confirm what was to all appearances no longer valid. [The letter concluded as follows :]—

“ The Board allude more particularly to the fact, that the agreement was entered into on the faith of a representation, distinctly made by the engineer employed by your Lordship on the occasion, (Mr. Leather), that a line could be found by Blackmoor and Writtle, which would be ‘ in every respect, decidedly superior ’ to the Parliamentary line, whereas it has been established, beyond all question, by the surveys which have since been made, not only by the engineers of the Company, but by other engineers of the first eminence, who have been called in to assist, that so far from being ‘ in every respect decidedly superior ’ to the act of Parliament line, the Writtle line is so decidedly inferior, and of so very difficult and impracticable a character, that the Board could not, without an utter sacrifice of the interests of the public, and of their constituency, consent to its adoption. The Board have further ascertained, that had a bill been brought into Parliament for powers to carry into effect the proposed deviation by Writtle, it would have encountered so strong an opposition, not only from the whole of the landowners on the line of deviation, with the exception of your Lordship, but

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from the county at large, that no expectation of carrying it could have been reasonably entertained. The proofs of these facts, the Board would be glad to be allowed an opportunity of laying before your Lordship. No alternative is therefore left to the Board, but to adhere to the line prescribed by the act; and the object of the notice left at Thorndon Hall, was to give your Lordship an opportunity of claiming whatever you think you are fairly entitled to, under the greatly altered circumstances of the case, and to give the Company an opportunity of considering, how far they would be justified in taking a large and liberal view of the matter in acceding to your Lordship's claim, whatever it may be."

That the Company have abandoned all intention of taking the Writtle line, and have determined to proceed with the Thorndon line, and have given notice to the tenants of the plaintiff on the last-mentioned line, of their intention to take lands for that purpose, and they intend to commence working thereon without paying the sums of £20,000, and £100,000 as agreed to be paid by them.

The bill charged, that the agreement of the 25th of April was valid, and had been entered into by the persons thereto of the first part, as the agents, and on the behalf and with the authority of the subscribers to the undertaking; and that the Company had, since the passing of the act, recognised the authority of those persons to execute the agreement on behalf of the Company, and had admitted the agreement to be binding on the Company. [The bill then stated as evidence thereof, a report of certain proceedings of the Committee of Management, read at a general meeting of the Company.] That the Company have abandoned all intention of applying to Parliament, to enable them to vary the line of the railway, and intend to proceed with and execute the Thorndon line, and they have entered upon and marked out such line. That by reason of various technical forms, the plaintiff is unable

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to proceed at law for recovering the sums agreed by the deed of the 25th of April, 1836, to be paid to him in the events which have happened. That the parties to the agreement of the first part, have incurred other liabilities on behalf of the Company, besides that to the plaintiff, and they are not able to meet by a large sum of money those liabilities. That the sums of £20,000 and £100,000 were not intended to be in the nature of a penalty, but were to be the actual sums to be paid by the Company in the event that has happened. That if the said two sums agreed to be paid to the plaintiff, and the sum of £35,000 agreed to be paid to Mr. Labouchere, in respect of other lands, are paid, the capital of the Company, even with the sums authorized to be raised under the act (a), will be insufficient for the completion of the project. That the injury which would be done by taking the Writtle line, is much less than would be done upon the Parliamentary line, and there is consequently no material opposition upon that line, or, at all events, none equal to that which would have been sustained from the landowners upon the Thorndon line, if the agreements with the plaintiff and Mr. Labouchere had not been executed. That the Company have taken no means to ascertain whether there is or not, or would or would not be an opposition upon the Writtle line. That neither Mr. Leather, nor any person on the part of the plaintiff, ever pledged himself or themselves, that the Writtle line was a better line than the Thorndon line. That under and by virtue of their act, the Company are invested with powers, which would be in many respects modified and qualified as against the plaintiff, if the agreement of the 25th of April was ratified by the Company, and, in particular, that the 29th clause of the act provides, "That if any person interested or entitled, or incapacitated to sell, agree, convey, or release lands to be taken by the

(a) The Company were authorized to a capital of £1,600,000, in all
ized to raise £533,333, in addition £2,133,333.

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Company, shall not agree with the Company as to the amount of the purchase-money, satisfaction, recompense, or other compensation as therein mentioned, or if any person shall, for the space of one calendar month next after notice in writing shall have been given, neglect or refuse to treat, or shall not agree with the Company for the sale and conveyance of his estate,—[Then followed the usual provisions as to the summoning of juries to assess the value of such lands and the damages in such case.] That the Company having given such notice, and one calendar month having elapsed, and the agreement not having been ratified, intend to summon a jury for the purposes aforesaid. That the defendant J. C. Robertson, is the secretary of the Company, and is well acquainted with the truth of the matters aforesaid.

The bill prayed, that the Company may be decreed to execute a deed of confirmation of the contract of the 25th of April, 1836, and that, if necessary, it may be referred to the Master to settle such deed; or that the Company may be decreed to pay to the plaintiff the two sums of £20,000 and £100,000, the plaintiff being ready and willing, and hereby offering to make and execute to the Company a proper conveyance of such of the messuages, lands and premises, as they are authorized to take, by virtue of the act of Parliament, comprised in the notice of the 8th of October, 1836; and that the Company may be restrained by injunction from entering, for the purposes of the act, upon the estate of the plaintiff, or any part thereof, until they shall execute such deed of confirmation as above mentioned; and may be restrained in like manner, from commencing any works for making or executing the railway upon the plaintiff's estate, or any part thereof, until they shall have paid the two sums of £20,000 and £100,000; and may in like manner be restrained from issuing any warrant under their common seal, or under the hands and seals of any of the directors of the Company, to the sheriff

of the county of Essex, or any other person, under and by virtue of the 29th or any other section of the act, for the purpose of impanelling or summoning, or procuring to be impanelled or summoned any jury, to inquire of and assess the sum of money to be paid for the purchase of the plaintiff's lands, or any part thereof, or to inquire of, or assess the sum to be paid for the damage sustained by the severing, dividing, or taking thereof. And for further relief.

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Mr. *Knight Bruce*, and Mr. *Wigram*, on affidavits of the plaintiff, of Mr. Few, Mr. Leather, Mr. Lawford, and Mr. Coverdale, verifying the statements in the bill, moved *ex parte* before the Lord Chancellor for an injunction.

The LORD CHANCELLOR.—Is there any act which the Company are about to do, which necessarily requires an *ex parte* injunction?

Mr. *Knight Bruce*.—Under the powers of the act, the Company would be enabled to issue a jury warrant at the expiration of seven days, from a notice which they are now in a situation to give.

The LORD CHANCELLOR.—An *ex parte* injunction ought never to be granted, unless there is some real mischief, either likely to arise or requiring to be immediately remedied. I think, upon your statement, you may take an injunction to prevent the proceeding before a jury.

[The order restrained the Company from issuing any warrant under their common seal to the sheriff of the county of Essex, for the purpose of impanelling a jury, to assess the sum of money to be paid for the purchase of the plaintiff's lands, or for satisfaction, recompence, or compensation for the damage sustained by the severing,

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dividing, or taking thereof, until answer or further order with liberty to the defendants to move to dissolve the injunction, before His Honor the Vice-Chancellor.]

The defendants moved to dissolve the injunction.

Mr. Jacob, Mr. Russell, and Mr. Pitman for the motion, relied on the then recent decision of the Master of the Rolls, in *Simpson v. Lord Howden* (a), and submitted, that the statement in the bill, "that if the agreements with the plaintiff and with Mr. Labouchere are completed, the capital of the Company will be insufficient for the completion of the project," shewed, that the agreement in question amounted in fact to a repeal of the act of Parliament (b). That the contract of the 25th of April was not an absolute purchase, but was merely putting what was intended to be a penal sum into the form of an agreement, in order to avoid any legal question as to the validity of the transaction. That the act gave the Company two years from the time of its receiving the Royal Assent, within which to obtain possession of the lands requisite for the completion of the railway, which time would expire on the 4th of the then following July; that unless the injunction were dissolved, or conditionally relaxed, it would amount to a conclusive decision of a case, involving legal principles of great importance, which ultimately could only be satisfactorily decided in a Court of law, or in the House of Lords.

That the injunction ought to be modified, to the extent of allowing the Company to obtain the verdict of a jury on the value of the land required to be taken, the Company undertaking not to enter on the land until the further order of the Court. That by so doing, no injury could

(a) 1 Keen. 583, ante, p. 334. (b) *Hargreaves v. The Lancaster and Preston Railway Company*, the Exchequer Chamber in error. ante, p. 430.
 See ante, p. 347.

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possibly be occasioned to the plaintiff, for, if the case were ultimately decided in his favour, the Company would, as the condition of being permitted to enter on the lands, pay to him the value assessed by the jury, and any difference in amount, between that sum and the sums specified in the agreement. *Attorney-General v. The Mayor of Liverpool* (a).

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Bellasis*, for the plaintiff, were not required to address the Court.

The VICE-CHANCELLOR.—This appears to me to be an exceedingly simple case. It has been opened before me, as if Lord Petre had assented to a scheme, which would have the effect of neutralizing the views of the legislature, and had actually himself come forward, and, on his own affidavit, stated circumstances which would hold himself out as a Peer of Parliament, contriving a fraud upon the legislature. I could not believe that a case of this nature existed; and upon looking at the affidavits, it appears to me, that they afford not the least ground for supposing, that any such transaction ever was conceived, or that Lord Petre ever did anything inconsistent with those proper feelings which his affidavit exhibits. The case has been treated before me, as if, at the time when the agreement of the 25th of April, 1836, was made, it had absolutely become binding on the parties to take the Thorndon line; that such was not the case is manifest from two circumstances: first, at that time the act of Parliament had not passed,—it did not pass until the ensuing 4th of July; and secondly, the statement of Mr. Few, that he endeavoured to obtain an interview with Mr. Duncan, on the subject of the agreement, but did not obtain it until the 25th of April, and that Mr. Duncan then said, “that he had had great difficulty in prevailing on the gentlemen, parties thereto,

(a) 1 Myl. & Cr. 207.

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to enter into such a contract, inasmuch as they said it was an absolute contract to purchase, at the given sums of £100,000 and £20,000, and he had explained to them, that although it was an absolute contract to purchase, they might, by adopting the Writtle line, avoid it." It is, therefore, quite evident, that nothing like a fraud was intended, but that Lord Petre was determined to oppose the bill, unless the Company would either by the bill take the Writtle line, or should be bound, upon entering on his land, to pay him £100,000 and £20,000. It does not appear to me, that there is any ground whatever, for imputing anything like an improper motive to Lord Petre for so doing. This was a place built by an ancestor of his own, and great pains had been taken to improve the estate by plantations and other ornamental works; and Lord Petre was, as he states, much attached to the sports of the field, especially to fox-hunting, and was anxious to prevent any unnecessary violation of that amusement, and with that view it is, that he states, "that he wished, if the Company would not adopt the Writtle line, but would come on the south of the road," that then they should pay these enormous sums, meaning it as a precaution against their doing a thing, which was so much adverse to their pecuniary interest, and of course, looking in some degree to the sort of recompense he would receive, in the case of the Company taking the southern line. His affidavit shews, that from beginning to end, he meant no fraud upon the legislature, but intended, that the Company should most distinctly understand, that if they interfered with his patrimonial enjoyments and comforts, then that they should pay these sums. With their eyes open, after discussion with Counsel, and upon the advice of their solicitors, they made the agreement of the 25th of April; moreover, they might have freed themselves from the necessity of paying one farthing to Lord Petre, because he had said frankly, "Take the Writtle line and I will not

oppose the bill." I must, therefore, view this case, precisely as I understand the Lord Chancellor to have viewed it; and I think, that if there had been any foundation for the observations which have been made in this case, that those points would have occurred to the Lord Chancellor. After the subject has been attentively considered for seventeen months, it is discovered, that what the Lord Chancellor thought was perfectly right and proper, was a fraud on the legislature, and not to be countenanced. I shall assume, that from the beginning the injunction was right, and then the question is, whether, because in the space of a few days, the Company may be placed in such a situation, as that they may not be able to free themselves from the binding terms of this agreement, and may be deprived of all powers and rights they now possess under the act of Parliament, I am for that reason to interfere? The hardship complained of, is the expiration of the parliamentary time, but as I understand the case, the Company have brought that hardship upon themselves. My opinion, upon a review of these affidavits, being, that the injunction was originally rightly granted, and that there is no ground upon the lapse of time, to give relief in the way asked, by partially modifying the injunction, I refuse the motion with costs.

[The Company subsequently agreed with Lord Petre, to pay him the £120,000 by instalments.]

See the cases of *Simpson v. Lord Howden*, and *Lord Howden v. Simpson*, ante, pp. 326—347.

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1838. Between JOHN SEMPLE, - - - Plaintiff,
 March 23rd. and
 THE LONDON AND BIRMINGHAM RAILWAY
 COMPANY, - - - Defendants.

The plaintiff, a lessee of a wharf and premises, of which The Regents' Canal Company were the proprietors, had covenanted to bear, in common with other lessees, the expense of keeping in repair a private road, called the Commercial Road, leading from his premises to a public road.

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acts provide, that the Company shall not take, use, damage, pass along, or interfere with the said Commercial Road, without the previous consent of The Regents' Canal Company under their common seal.

A contractor for the railway works deposited, during the 1st and 2nd days of March, a quantity of clay on the Commercial Road, near the entrance to the plaintiff's wharf: on the 10th of March, the plaintiff filed his bill, to restrain the Railway Company from laying down, or causing to be laid down any clay on the road; and upon an affidavit made the same day, verifying the facts, obtained on the 12th of March an *ex parte* injunction prohibiting such further deposit. The Railway Company, at the instance of an officer of the Canal Company, had begun to remove the clay on the 9th of March, of which fact the plaintiff was ignorant at the time of making his affidavit.

Held, that although the plaintiff might, if he had made inquiries, have known, that the clay was in course of removal, yet his ignorance of that fact, owing to which it was not made known to the Court, was not equivalent to concealment or misrepresentation, and that the *ex parte* injunction was therefore not improperly obtained.

That the Canal Company were not necessary parties to the suit.

That a contractor for the execution of railway works must be deemed an agent of the Company.

Although the Court, on the application of one of the several persons entitled to the easement in question, restrained an excessive use thereof by the Railway Company, it refused on the same application to restrain the total use, the Canal Company appearing in some manner to have given their consent to the use of it, although not under their common seal.

proprietors, their successors and assigns, and in default of payment thereof, upon demand in writing to be left at the demised premises, then the same shall be recovered and recoverable in like manner as rent reserved under the said lease;”—with the usual covenant from the lessors for quiet enjoyment, against all persons claiming under them.

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That the road was at the time when the lease was granted to the plaintiff, and has ever since been, and is now, the only road leading to the plaintiff's wharf and premises; and the only way by which goods can be conveyed thereto by land-carriage; and is commonly, and in the first of the acts of Parliament hereinafter mentioned, called and known as the Commercial Road; and the plaintiff, since the lease was granted to him, has, together with the other owners and occupiers of the adjoining wharfs and premises, from time to time used and occupied the road, and been liable to pay and has paid a proportion of the expenses of keeping the same in repair.

The bill then stated the act, incorporating the London and Birmingham Railway Company (a); and giving them power to purchase and hold lands to them and their successors and assigns. That the act contains the following clause:—"Whereas the railway is intended to commence at or near the Regents' Canal in the parish of St. Pancras, be it enacted, that nothing in this act contained, shall take away, diminish, alter, prejudice, or affect any of the rights, privileges, powers, or authorities, vested in the Company of proprietors of the Regents' Canal, or authorize or empower the Railway Company to alter the line or level of the Canal, or the towing path thereto, or any part or parts thereof respectively, or to obstruct the navigation of the Canal, or of any part thereof; or to divert any of the waters therein, or which may be taken for the use of, or which now supply the Canal, or to interfere with, or injure, or take, or use any of the lands, wharfs, roads, towing-

(a) Ante, p. 120.

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paths, or any of the works belonging to the Company of proprietors; and that it shall not be lawful for the Railway Company, by the exercise of any of the powers, privileges, or authorities by this act given, to take, use, damage, pass along, or interfere with the road called the Commercial Road, leading from the Regents' Canal to the Hampstead Road, or the footpath of the said road, or any of the land or locks, side ponds, towing-paths, bridges, banks or feeders, or other works, of or belonging to the Regents' Canal, or any part thereof, without the consent of the Company of proprietors of the Regents' Canal, under their common seal, first had and obtained."

The bill then stated the act, enabling the Railway Company to extend and alter the line of railway (*a*); and in such act is contained a clause as follows: "And whereas the railway is intended to be carried over the Regents' Canal, in the parish of St. Pancras, in the county of Middlesex, and it is expedient to provide against any injury or obstruction being occasioned by means of the railway to the canal: Be it therefore enacted, that nothing in this act contained, shall diminish, alter, prejudice, affect, or take away any of the rights, privileges, powers, or authorities vested in the Company of proprietors of the Regents' Canal, or authorize or empower the Railway Company to alter the line or level of the canal, or of the towing-path thereto, or of any part thereof; or in any manner to obstruct or impede the navigation of the canal, or any part thereof; or to divert, intercept, cut off, take, use, or diminish any of the waters therein, or which may be taken for the use of, or which supply the canal, or to interfere with or injure any of the works of the canal, or to take or use any of the lands or buildings belonging to the Regents' Canal Company; and, that it shall not be lawful for the Railway Company to make any deviation from the course or direction of the railway, so delineated in the

(*a*) Ante, p. 160.

maps or plans deposited with the Clerk of the Peace, for the county of Middlesex, by which deviation, any of the works belonging to the Regents' Canal Company shall be taken, used, or damaged, without the consent of the Company in writing under their common seal, first had and obtained." That, pursuant to the powers of the first-mentioned act, the Company commenced the formation of the railway, and they have purchased land for that purpose on the north side of and adjoining to the Commercial Road, and also at the west end of and adjoining to the termination of the Commercial Road; and they have built a high wall on the north side and west end of the road, so as to fence off the road from their land. That the entrance to the plaintiff's wharf for carriages and persons on horse-back and on foot is through a gateway on the south side of the Commercial Road, facing the high wall on the north side thereof, and the wall is only thirty-two feet from the plaintiff's gateway, and the wall of the plaintiff's wharf; and the road, including the footpath, is consequently only thirty-two feet in width, being barely sufficient to allow of carriages with timber and other articles to turn, so as to pass into or out of the plaintiff's wharf, when the road is clear and free from obstruction. That notwithstanding the clause contained in the first-mentioned act, the railway Company, in the course of the year 1836, commenced using the Commercial Road, for drawing timber, stones, and other articles for the purposes of the railroad, and they have ever since continued to use and now use the same at intervals, and, in so doing, have cut up and destroyed the road, and at length rendered the same almost impassable. That from time to time, during such last-mentioned period, the plaintiff has written and sent letters to the Railway Company, requesting them to desist from using the road, or else to put the same into repair, so as to be in a condition for the use of the plaintiff, and the other tenants of the Canal Company, but the Railway

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Company have not sent any answer to such letters, and still continue to use the road, and they have cut up and destroyed the same in manner aforesaid, and have almost wholly destroyed the footpath, leading by the side of the road under the wall of the plaintiff's wharf and dwelling-houses, and the carts and carriages belonging to the Company, passing along the road, have rendered it dangerous for persons to pass and re-pass to and from the plaintiff's wharf. That on the 1st of March the Company caused a cart-load of planks to be laid down in the Commercial Road, opposite to the gates leading into the plaintiff's wharf, and to the windows of his house which look into the road; and in the course of the same day, the workmen of the Company, or some person acting for or under them, made a run or way with the planks, from the west end of the road over the wall to the land on the other side of the wall; and in the course of the same day, they placed on the road in such last-mentioned part thereof, upwards of fifty-two loads of clay, for the purpose of being conveyed by means of such planks into their land, and thereby rendered access to the plaintiff's wharf with carts and carriages wholly impossible; and the Company caused some part thereof to be wheeled into their land in the course of the same day, and other part thereof remained and still is on the road. That on the next following day, the Company proceeded again to cart clay, and deposit the same in the road, and continued to do so to such an extent, as to render it almost impassable, or, at all events, difficult and dangerous to pass into the plaintiff's wharf and house; and the workmen of the Company would have proceeded with their work, and continued to cart more clay into the road, had they not been prevented from so doing by the surveyor of the Regents' Canal Company, who interfered for that purpose at the instance of the plaintiff; but a large quantity of such clay still remains on the road, opposite the plaintiff's wharf gates and house, and thereby the entrance thereto

is very much impeded, and rendered dangerous to persons passing to and from the same. That a large quantity of earth and clay has been provided by the Company, and is now ready to be carted or conveyed by the Company, or their servants or agents on their land, and it is the intention of the Company or their agents, servants, or workmen to cart, or in some manner to convey the same to, and place the same upon the road, for the purpose of taking it into or upon their lands. The bill charged, that the plaintiff has already suffered great damage and loss of business, and his carts, waggons, and horses, and those of his customers, have been greatly damaged and injured by the bad state of the road, in consequence of the Company using the same from time to time as aforesaid, and the Company continue to use and are now using the same, and their carts, waggons, and horses, or those of their agents or servants, and their servants and workmen, or those whom they employ, are daily passing along the road in so great numbers, as to render it dangerous to pass in so narrow a road : and the plaintiff is apprehensive that he shall lose his custom, and be deprived of the benefit of his lease, and the use of the wharf, if the Company be not restrained from using the road in manner aforesaid. That the Commercial Road is not properly a thoroughfare, beyond the plaintiff's house and wharf towards the west, except to two small dwelling-houses of the plaintiff's adjoining to the wharf, and except for the horses belonging to persons towing on the canal, which occasionally pass and re-pass on the road, in going from one part of the canal to another, for which purposes only there is a right of way. That no licence or consent of the Canal Company has been granted to the Railway Company to use the road, and they have no authority, leave or licence to use the same ; nevertheless, they have placed gates or doors in the wall at the west end of the road, sufficiently large to allow carts and waggons to pass through the same to and from the road to

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their land, and they constantly and daily use the same for the passage of carts and waggons, into and out of their lands, and proceed to and from the Commercial Road, and they threaten and intend to continue to do so. That such use is contrary to the provisions of the Railway acts. The bill prayed, that the London and Birmingham Railway Company may be restrained, by injunction, from injuring, using, damaging, passing along, or interfering with the road called the Commercial Road, or the footpath thereof; and from laying down, carting, or wheeling any clay, soil, or other matter or thing on the road, or the footpath thereof; and from continuing any impediment or obstruction, to the due and proper use by the plaintiff of the road and footpath; and that the Railway Company may be ordered to pay the costs of this suit. And for further relief.

On the 12th of March, on an affidavit verifying the facts stated in the bill, the plaintiff obtained from the Vice-Chancellor an *ex parte* injunction, restraining the Company from laying down, carting, or wheeling any clay, soil, or any other matter or thing on the road in question; his Honor declining to make the more extended injunction, moved for in the terms of the prayer of the bill.

The Railway Company demurred. For that the bill did not contain sufficient matter of equity, whereupon the Court could ground any decree in favour of the complainant as against the defendants; and for further cause of demurrer, that it appeared by the bill, that the Company of proprietors of the Regents' Canal, and the persons in the bill described as the owners or occupiers of the adjoining wharfs and premises, therein mentioned or referred to, were necessary parties to the bill, and were not made parties thereto.

Mr. *Jacob*, and Mr. *Booth*, in support of the demurrer.

Mr. *Knight Bruce*, and Mr. *Stinton*, in support of the bill.

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The VICE-CHANCELLOR.—It appears to me that this demurrer ought to be overruled. As I understand the case, the plaintiff has a possessory right to the wharf; and this road is not a general public road, but only to be used by persons who are going to the plaintiff's wharf, and to the other houses which the bill mentions; but there is a general right of passage on foot or on horseback. Now by their act, the Railway Company are positively restrained from the exercise of any of the powers or authorities thereby given, as to taking, using, damaging, passing along, or interfering with this road, or the foot-path, or any of the other works belonging to the Regent's Canal, without the consent of the Canal Company, which consent the bill avers that the Railway Company have not obtained. I understand the plaintiff to be in the situation, virtually of sub-lessee of the Canal Company, and the facts complained of to be, that by reason of the carriage of a great quantity of clay, which is deposited opposite the entrance of his premises, the plaintiff is actually deprived of the use of his wharf: and that, independently of this, the Company are by means of planks making a passage over the wall which bounds this road into their own land:—in other words, by means of a sort of trespass or nuisance upon the plaintiff, they are obtaining what otherwise they would not have,—an access to their own land for this quantity of clay. I certainly think that it is competent for the plaintiff, who is the person actually inconvenienced by this proceeding of the Company, to file a bill by himself alone, against the persons who are doing this injury to him in particular (a). It is, I think, the same as if he were the mere tenant of a house, and the Company had raised a building for the purpose of obstructing his light, when, I apprehend, he

(a) See *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 193; ante, p. 159: *Sampson v. Smith*, 8 Sim. 272.

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might file a bill to restrain them from so doing. The demurrer must be overruled.

Notice of a motion was given on behalf of the defendants to dissolve the injunction which had been granted. In support of the motion, affidavits were filed by the Company, to the effect, that no more than fifty-three loads of clay had been deposited on the road; that this use of the road had been made by the contractor for his own convenience, without the authority or knowledge of the Company; that the plaintiff knew of the alleged obstruction on the 1st of March, and at that time made no objection thereto; that on the 2nd of March, as soon as they were aware of the fact, the Company directed that no more clay should be laid on the road; that the clay which had been laid down would have been removed by the 5th of March, if the surveyor of the Canal Company had not refused to permit its removal; that the removal was commenced on the 9th, and finished on the 13th of March; that the bad state of the road arose from a then recent thaw, and not from the cause alleged in the bill; that no intention either existed or had been intimated to convey a further quantity of clay along the road; that the road not being a private one, the Company were entitled to use it, in respect of property occupied by them at the one extremity thereof; that the use of the road had been made with the consent of the Canal Company, on condition that the Railway Company repaired it; and that the latter Company had subsequently put the road into thorough repair.

The further affidavits on behalf of the plaintiff, stated, that the road was constructed at the expense and for the sole use of the tenants of the Canal Company, and was a thoroughfare for them only. That the clay was laid on the road to the depth of three or four feet; and that timber could only be conveyed to the plaintiff's wharf, by passing over the foot-path, with great inconvenience and with

danger to passengers; and, that the plaintiff had never assented to or acquiesced in the obstruction.

Mr. *Jacob*, and Mr. *Booth*, in support of the motion to dissolve the injunction.

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Mr. *Knight Bruce*, and Mr. *Stinton*, contra.

The VICE-CHANCELLOR.—On the substance of the case, I feel no doubt. As I understand it, the defendants do not deny that the act complained of was wrong. In the course of the 1st and 2nd days of March last, fifty-three cart-loads of clay were deposited in a manner which (admitting the defendants had a right to use the road with carriages) was certainly so placed as to create a considerable obstruction to the entrance into the plaintiff's wharf. If fifty-three cart-loads of clay are heaped up near the entrance of a wharf, creating an impediment to the passage of timber, by reason of the height of the mound, catching the ends when timber-carriages have to make a turn, or by reason of the depth, if it were three or four feet deep, preventing the cattle from drawing them, which is what I suppose the plaintiff alluded to, there would be a very material obstruction created to the use of the wharf. It appears, that the defendants themselves were so conscious of this that they did take some steps for removing the clay: but I do not apprehend that it is necessary for a plaintiff, when the thing of which he complains has actually been done, to wait to see with what degree of celerity or tardiness the obstruction or injury may be removed. It is his right immediately to apply for such relief as the Court can give by way of injunction; and it appears to me, on looking at the affidavits, that there was considerable ground for believing it to have been, at one time, the intention to bring a much larger quantity of clay than actually was brought, and to deposit it on the same spot. A remonstrance

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was so early made by the plaintiff that it actually had the effect of stopping the ulterior injury which he apprehended. The bill was filed on the 10th of March, and at that time all this clay had not been cleared away. The application for the injunction was made on the 12th, and I do not consider it was necessary for the plaintiff immediately before perusing the affidavit which was to be made on the 12th of March, himself to go to the exact spot, and make a calculation of how much had been removed, and what time would be necessary to remove the remainder. At the time when his affidavit was actually put on the file, part of the very clay which was the subject of complaint remained on the ground. It is a remarkable thing, that the affidavits which are filed by way of justifying the conduct of the defendants, state that the clay had originally been first brought at three o'clock in the afternoon of the 1st of March, and had all been deposited by two o'clock on the afternoon of the 2nd of March; but it appears, that, when they had to remove the nuisance, they took from the 9th to the 13th; and therefore the plaintiff had a just cause of complaint.

The Court granted an injunction, restraining the Company from laying down, carting, or wheeling any clay, soil, or any other matter or thing on the road; and I must say it appears to me that the plain meaning of those words is not to restrain the party from carrying the clay and soil along the road, but is to restrain him from laying it down; or, as the common expression is, especially in the country, from carting or wheeling any clay or other thing on to the road, which means, depositing it by means of carts or wheelbarrows. When the injunction was applied for *ex parte*, I only granted it to the extent which I have mentioned. I stated that notice of motion for the residue of the injunction prayed by the bill, must be given,—which residue extended to restrain the defendants from in any manner using the road. I cannot conceive it possible to suppose

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that these first words, which contain the substance of the special injunction, could be taken to mean to restrain the party from any use of the road; and therefore it does not appear to me that it is necessary to make any alteration in the terms of the injunction actually granted. I agree that the Court ought not to grant an injunction which would be a surprise on a party; and that the terms or language of an injunction ought to be reasonably clear. It appears to me that the terms of this injunction are so reasonably clear that they ought not to be altered. I think, upon the whole, that this plaintiff (though he may have used language too large in speaking of the magnitude of the injury complained of,) had an essential evil to complain of, which it was the bounden duty of the Court to relieve him from; and, though I admit there may be an occasional obstruction to the door of a house or other place by the stopping of a carriage, or the deposit of bricks, or other things of a like nature, yet, if any person were to collect before the house of another so many carriages as to require four days to remove them all, as was the case with this clay, I think any one would say that was a case in which an injunction might very well be granted. My opinion on this case is, that the injunction ought to stand as it is; and I think no such case is shewn on the part of the defendants as ought to prevent me from refusing this motion with costs.

The plaintiff moved to extend the injunction to restrain the Company from in any manner using the road.

Mr. *Knight Bruce*, and Mr. *Stinton*, for the motion.

Mr. *Jacob*, and Mr. *Booth*, contra.—The principal point of argument was, whether the Regent's Canal Company had or not given permission to the Railway Company to use this road. The counsel for the plaintiff relied on the necessity of such consent being evidenced by the common

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seal of the Canal Company, and the absence of all proof of such formal consent. The counsel for the Railway Company adduced the former affidavit, shewing that the Canal Company had given an assent, on condition that the Railway Company put the road into repair; and adverted to the fact of the road having been put into repair by the Railway Company.

April 26th.

THE VICE-CHANCELLOR.—The freehold and inheritance of the soil of the road in question is vested in the Regent's Canal Company. In 1824, they leased certain portions of ground for the express purpose of building wharfs, and there is in these leases, either by express terms or necessary implication, a permission to the lessees to use this Commercial Road, and they were in return to contribute to the repairs of the road. In 1833, the act for forming the London and Birmingham Railway passes; and that act provides, that the last-mentioned Company shall not be at liberty to use the Commercial Road without the consent of the Regent's Canal Company under their common seal. It appears clearly that the Regent's Canal Company have in some form or other granted leave to the Railway Company to make use of this road; at all events, the Railway Company have repaired this road, which is what the affidavits, as uncontradicted, state to be the consideration for the license granted by the Canal Company. It has been said that this leave or license was not given under the common seal of the Canal Company; but there has been, if not in form, at least in substance, a consent by the proprietors of the soil, and this Court will not, under such circumstances, interfere by injunction at the suit of one of several persons intitled to an easement, to restrain the effect of a license or permission of the owners of the soil. The motion must be refused, with costs.

The Railway Company moved the Lord Chancellor to dissolve the injunction.

Mr. *Jacob*, and Mr. *Booth*, in support of the motion, cited *Deere v. Guest* (a), *Coulson v. White* (b).

Mr. *Wigram*, and Mr. *Stinton*, contra.

Mr. *Jacob*, replied.

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The LORD CHANCELLOR*.—I quite admit, that, whatever title a plaintiff may have to an *ex parte* injunction (which is the mode in which this Court affords extraordinary relief to parties injured), if it subsequently turn out that it was obtained through means of misrepresentation or concealment on his part, he ought to have no benefit from it, but it should be discharged with costs. That is quite unconnected with merits; and, if the Court is imposed upon, it will subsequently so watch its jurisdiction as to take away the advantages which the party would derive from an abuse of its process.

May 28th.

Now, let us inquire whether in the present case there were fair grounds for applying for the injunction, at the time it was obtained. The plaintiff had a right to enjoy the road in question. He learns that the defendants intend to bring as many as 20,000 cubic yards of soil from time to time upon the road; and he finds, that, on the 1st and 2nd of March, fifty-three loads are actually brought, and placed opposite to his gates, so as to obstruct, to a certain extent, the entrance into his premises. There it remains, till the bill was drawn at least; for its removal was not commenced till the 9th, and the bill was filed on the 10th. I do not think it can be said there was no ground for applying for an injunction, especially when we remember how many more loads were expected to be brought and placed in a similar manner.

(a) 1 Myl. & Cr. 522.

(b) 3 Atk. 21.

Mr. E. Chitty, for this judgment of the Lord Chancellor.

* The reporters are indebted to

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It is complained of, that an injunction was applied for *ex parte*, and it is said, that, if notice had been given, such explanations would have been adduced as would have shewn there was no reason for the application. If the defendants had contended for any right so to use the road, that would have been another matter: but this was such a nuisance, that, unless that were the case, the plaintiff had a clear right to an injunction *ex parte*. The delay that giving notice would have entailed, is alone a sufficient justification of the application being made *ex parte*. I am of opinion that the use the defendants made of the road (admitting they had any right at all to use it) was unreasonable, and not to be allowed; and therefore the injunction was rightly granted. The question then is, has the plaintiff so misconducted himself by misrepresentation or concealment, that the injunction should now be discharged. If the plaintiff knew that, on the application of the officer of the Canal Company, the defendants had proposed to remove the soil, and to deposit no more, he must have been guilty of perjury in his affidavit. But the facts shew no such knowledge, and there is therefore nothing to induce the Court to believe that perjury was committed. Perhaps, having requested the officer to apply to the defendants, he ought to have ascertained the result of his mission before commencing litigation: but the mere ignorance of what a party might have known, is not equivalent to concealment, so as to amount to improper conduct. I am, therefore, of opinion there has been no misrepresentation or concealment in this case, unless the defendants are able to bring home to the plaintiff actual knowledge of their intention to remove the obstruction. As to the terms of the order, the plaintiff, it appears, applied to the Vice-Chancellor, by a second motion, to restrain the defendants altogether from the use of the road in question, which was refused, with costs; and, on the motion to dissolve the injunction, the Vice-Chancellor explained the mean-

ing of the order. The defendant can, therefore, have no pretence for saying that the order now existing may be construed so as to effect that which on the second motion the Vice-Chancellor refused, namely, to restrain them altogether from using the road. I have no doubt that the contractor must be considered as the servant or agent of the Company in this case: I therefore confirm the Vice-Chancellor's order, and refuse this motion, with costs.

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Between THOMAS READ KEMP, - - Plaintiff,
and
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COMPANY, - - - - Defendants.

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April 25th.

THE bill stated the act incorporating The London and Brighton Railway Company, made in the 1st year of the reign of Her present Majesty, and intituled "An Act for making a railway from the London and Croydon Railway to Brighton, with branches to Shoreham, Newhaven, and Lewes." The bill then stated the 12th section of the act, being the clause conferring on the Company the usual and necessary powers for making and maintaining the railway; and, among others, to divert or alter the course of, or to raise or sink any roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway. That, by the 25th section, it is provided, that, in all cases wherein, in the exercise of the powers by the act granted, any part of any carriage or horse-road, railway, or tram-road, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient

Application of the principles of Courts of Equity, in restraining the exercise of powers granted by Parliament for the compulsory taking of land and diverting of roads, in cases where there is a question for the decision of a Court of law, whether conditions imposed as precedent to the exercise of such powers have been duly performed.

Inference deduced by the Court from the language of a precept issued under the

powers of a railway act for summoning a jury to assess the value of land, and from the indicia of the coloured plan annexed thereto, as to what parts of the land therein referred to and described have been taken into consideration by the jury in their verdict, proceeding upon such precept.

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for passengers, or carriages, or the persons entitled to the use thereof, the Company shall, at their own expense, before any such road shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road (as the case may require) to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, raised, sunk, taken, or injured, or as nearly so as may be; and where the road cut through, raised, sunk, or injured, shall be a turnpike road, the substituted road, if temporary, shall be set out and made, and the principal road restored, within six calendar months after the commencement of the operation. [The clause then proceeded to inflict penalties on the Company, in case of non-compliance with the last stated provision of the clause, and to prescribe the means for enforcing the same.] That the plaintiff is the owner of a certain farm and lands in the parish of Brighton, through part of which lands the railway is intended to pass, and upon part of which farm and lands it is intended that the station of the railway shall be made; and, on the 27th of November, 1838, the Company gave the plaintiff notice in writing of what land they should require, and identified the same in a map or plan thereto annexed. That the plaintiff, on the 6th of December, 1838, caused a statement in writing to be given to the Company, expressing his willingness to sell and convey the land so required, and to accept a sum therein mentioned as compensation for the damage which might arise from the same being taken; and, in such notice, the sum mentioned was stated to be without prejudice to any compensation, claim, or power to which the plaintiff was entitled, or which he possessed under the railway act, or otherwise, by reason or in consequence of any roads or ways being intersected, destroyed, discontinued, altered, diverted, or otherwise changed, or for any other matter or thing whereby as to such roads or ways the Company should not comply with

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the provisions of the act. That the value of the lands required by the Company was assessed by a jury, and the Company have since taken possession thereof. That a certain road or way called 'Cheapside' runs between the lands of the plaintiff from east to west, and has been, from time immemorial, used by the plaintiff and his predecessors, owners of the lands, and their tenants, for the convenience of carrying the produce of the land, for driving cattle, and other necessary agricultural purposes, and of communicating with the lands of the plaintiff on either side of the road, and as well for vehicles as for cattle and foot-passengers. That the Company intend to carry the railway across the road or way, and to intersect the same, and to take or occupy a space thereof of the length of two hundred feet, and altogether to prevent the plaintiff and his tenants from passing along the road; and, instead of making a communication for the use of the plaintiff and his tenants, by a bridge or otherwise, in a direct line connecting the two ends of the road, or any road or way as convenient as the present, the Company intend to stop up the road and to prevent the free use thereof at the place of intersection, and to make a road in lieu thereof, commencing at the west side of the intersection, in a southward direction, into a street called Trafalgar Street, and thence to arrive at the eastern side of the intersection, being a circuitous route of six hundred yards; and the plaintiff having appropriated some parts of the frontage of the land, at the eastern end of the road, to building purposes, contemplated appropriating the frontage at the western end to the like purposes. That, if the Company are permitted to stop up the direct line of communication between the same, the value of the plaintiff's land will be greatly diminished. [The bill then set forth a letter from the solicitor of the plaintiff to the solicitors of the Company, dated the 25th of February, 1839, referring to the statement of the 6th of December, 1838, whereby it would be

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seen that the treaty therein mentioned was made expressly without prejudice to any road or way, or right thereto, in order that the directors might not assume that the plaintiff would relinquish his right to a direct communication; and informing the solicitors of the Company that the plaintiff would insist upon having that communication preserved; and stating that the solicitors of the Company replied by a letter, dated the 26th of February, 1839, that they could not advise the Company to make the communication as proposed by the plaintiff.] The bill charged, that, by the terms of the act of Parliament, the Company are bound to make a direct line of road, by a bridge or otherwise, in lieu of that part proposed to be taken, and as convenient as the present road; and prayed that the defendants may be restrained from carrying their railway across the plaintiff's road, or otherwise intersecting, interfering with, or stopping up the same, or the communication thereof, until they shall have made and appropriated in lieu thereof, for the use of the plaintiff and his tenants, a good and proper road or way, by a bridge or otherwise, in a direct line or otherwise, according to the true intent and meaning of the act of Parliament. And for further relief.

The material sections of the act, are, the 28th, the 31st, and the 32nd. The 28th section enacts, that, in all cases wherein the railway shall be permitted or authorized to cross any public highway for carts or carriages on a level, the Company shall erect, and at all times maintain, a good and sufficient gate on each side of such public highway, where the railway shall communicate therewith. [Then follow regulations, to be enforced by penalties, as to the opening and closing of such gates]. The 31st section enacts, that, where any bridge shall be erected by the Company, for the purpose of carrying the railway over or across any turnpike road, the span of the arch of such bridge, in the case of a private carriage-road, shall be formed, and shall at all times be and be continued, of a

height, from the surface of the road to the centre of such arch, of not less than sixteen feet, and the descent under such bridge, in the case of a private carriage-road, shall not exceed one foot in fifteen. The 32nd section enacts, that, where any bridge shall be erected, for carrying any private carriage-road over the railway, the ascent of every such bridge, for the purpose of such private carriage-road, shall not be more than one foot in fifteen feet.

The plaintiff gave notice of a motion for an injunction, and filed affidavits verifying the facts stated by the bill.

The Company filed counter-affidavits, stating, that, on the plan which was submitted to the jury, when the value of the plaintiff's land and the compensation were assessed, a new road was marked out, as intended to be made in lieu of the road called 'Cheapside,' and the quantity of land required for such new road-way was valued by the jury and paid for by the Company. That the entire quantity of land which had been valued and paid for, was 15 acres 4 perches, which cannot be made up without including the soil of the road-way called 'Cheapside.' That the damage which the plaintiff's property would receive by the proposed change of road was estimated by the jury: that the expense of carrying the road under the railway by a tunnel would amount to £14,298: that the land contiguous to the road having been selected for a terminus station, renders the communication by gates on the level too dangerous to be adopted; that, having regard to the 31st and 32nd sections of the act, the mode of carrying the road over the railway by a bridge is impracticable. That the Company do not intend to stop up the road in question until they shall have opened the intended new road.

By affidavits in reply, it was deposed to that the jury were only required to value the land coloured green on the plan submitted to them; and that the roadway called 'Cheapside' was not so coloured. That the expense of a tunnel under the railway would only amount to £5,178.

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Mr. *Jacob*, and Mr. *Moore*, in support of the motion.

There are three distinct modes by which the provisions of the 25th section of the act may be complied with; namely, by making a bridge over, a tunnel under, or preserving the existing level of the road in question, continuing the communication between the intersected portion by gates (a). The words "as nearly so as may be," mean, with regard to physical possibility; and the Company cannot be permitted to allege expense or inconvenience as grounds for not complying with those provisions of the parliamentary contract which on their part they have undertaken to perform. *Coats v. The Clarence Railway Company* (b). *Spencer v. The London and Birmingham Railway Company* (c).

Mr. *Knight Bruce*, Mr. *Burge*, and Mr. *Goldsmid*, contra.

The affidavits of the Company give satisfactory reasons why the three suggested modes of preserving the communication of the road in question cannot be complied with. It is said that no argument of expense can be urged against the proposed mode by a tunnel (d); that might be so, if the capital to be raised by the Company was unlimited: the act however, prohibits the Company from raising beyond a certain amount (e). It is sworn, that the soil of the roadway has been valued, and that the plaintiff has received the amount at which it was assessed. The land on each side of the road belonged to the plaintiff, and, consequently, the soil of the road; for, a person cannot have an

(a) Section 28.

(b) 1 Russ. & Myl. 181.

(c) See ante, p. 168.

(d) By an affidavit made in a subsequent stage of the cause, the engineer of the Company deposed: that the necessity of forming certain subterranean passages, to connect

the several works necessary at the terminus station, would render the making the communication by a tunnel impracticable.

(e) By the 136th section, the capital of the Company is to be £1,800,000.

easement over his own freehold. This is not a road within the meaning of the 25th section: on this point, the Company are entitled to have a decision of a Court of law. The Company will also be entitled to the opinion of a Court of law, assisted by a jury, on the question, whether the proposed road is or not a sufficient compliance with the 25th section; and the present motion is premature; for, until the intended road is completed and tendered to the public, this question cannot be tried. If the plaintiff is aggrieved, there are other modes pointed out by the act, by which he may obtain redress; and this Court will not needlessly assume a jurisdiction in the matter.

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Mr. *Jacob*, in reply.

It is said, that, on the plan submitted to the jury, the road, as proposed to be substituted, was shewn; and that, in the assessment of the damage to the plaintiff's land, was included that which would arise from this change of road. But the damages which a jury can assess, are only in respect of matters authorized by the act; therefore, if the substituted road is not as convenient as the old road, it cannot be within the provisions of the act, and consequently could not be the subject of a jury assessment. The land coloured green was the only part of the plaintiff's lands which was required to be taken, and the only part that was valued; and the part so coloured corresponds with the quantity assessed.

[The Vice-Chancellor, by reference to certain data appearing on the plan referred to, computed the quantity of the several portions thereon coloured green; and stated, that they amounted to 15 acres 4 perches, being the exact amount of the land assessed and paid for.]

The VICE-CHANCELLOR.—As I understand the affidavits, there is no present intention on the part of the Company, to break up or injure the existing roadway; but they only

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propose to do so when they shall have completed the intended new road. According to my view of the case, the Company would have the power to let the road remain in its present state; and, by means of a temporary communication, continue the existing level of the road, that is, they would make a temporary road while doing a part of their railway work upon the road, and, when that work was completed, would take away the temporary road; and, by means of side-bars, the road would afterwards remain as at present. This I consider they are entitled to do under the act of Parliament. It seems to me that the time has not yet come for interfering by injunction. I must, with reference to granting an injunction, look to what is sworn to be the intention of the parties against whom the injunction is sought. Now, if the Company do not intend to interfere with the present road until they shall have completed the new one, it may then possibly happen that persons may prefer going by the new road, although somewhat circuitous, to the dangerous experiment of crossing the railway on the level by the present road. Supposing, however, the Company should alter their plan, and think it unnecessary to make a new road, and should leave the present road, completing by means of a temporary road their works thereupon, which, as I understand the act of Parliament, they may do; then those who may have to go from the east to the west, may exercise an option whether they will go round circuitously or cross the railway directly. It appears to me, that, if the Company determine to adopt this plan, they will not do that of which the plaintiff is apprehensive, and which he seeks to restrain. It appears to me, that, what the Court ought to do in this case, is, to let the motion stand over until the Company have completed their proposed road; and, if, on the completion of that road, they proceed in the manner which the plaintiff alleges to be illegal, this motion may be renewed, and the Court will then interfere or not. There will be one ad-

vantage in this course of proceeding,—when the intended road has been completed, it will be much easier to have the question tried, which the Company will have a right to have tried; namely, whether the intended road is as convenient as may be, within the meaning of the act of Parliament. Let the motion stand over until the Company shall have completed their proposed road, with liberty to apply generally.

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The plaintiff appealed to the Lord Chancellor.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Moore*, for the appeal.

Mr. *Knight Bruce*, Mr. *Burge*, and Mr. *Goldsmid*, in support of the order of the Court below.

THE LORD CHANCELLOR.—In this case, my only duty is, to ascertain what are the legal and equitable rights of the parties. I am not called upon to point out to the Company the most convenient mode of executing the works and exercising the powers which the act of Parliament has sanctioned. It appears to me that the situation in which the Vice-Chancellor's order leaves the matter, is most injurious to both parties; for instance, the Company are left in the dark as to what may be the construction of their parliamentary powers, and they may go on and finish the new road according to their own views of the act, and incur all the necessary expense, without any clue or notion whether, when it is finished, it will be a sufficient substitution for the old road. On the other hand, the plaintiff may then find that it is not in his power to apply for the intervention of the Court in sufficient time to raise the question whether he is or is not entitled to the protection of the Court. When once the Company are in a situation to deal with the present road, their proceedings will no doubt be so rapid, that, before this Court could interpose, the

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road will have lost its original character, and be in a state rendering it impossible to restore it to its original condition. The order pronounced therefore refuses all interposition of the Court in the question between the parties.

I am told that there are other modes of proceeding,—other remedies which the plaintiff may adopt, and therefore it is submitted to me that this Court ought to refuse to exercise its jurisdiction. Now, I consider that there cannot be a more useful exercise of the jurisdiction of the Court, than in interfering to ascertain the rights between parties circumstanced as in this case. I look at the great powers which are necessarily given to these Companies; the variety of interests with which those powers may interfere, if not strictly exercised according to the provisions of the acts; the necessity of immediate interposition; the injury to both parties, if there be not a jurisdiction constantly open, by which their respective rights may be ascertained: and then it appears to me that this is of all others a situation of things in which this Court ought to exercise that jurisdiction. My predecessors have established the authority of this Court to interfere in these cases, and I certainly feel it my duty not to repudiate a jurisdiction the exercise of which I believe to be most essential to the interests of the numberless persons who are, in some way or other, affected by these great works which are now so universally being carried on throughout the country (a). I have only, therefore, to consider what are the legal and equitable rights of the parties. Now, the course I have always adopted in cases where the question turns upon a legal right, is, to put the parties in a situation to try as quickly as possible that legal right, and to protect the property to be affected, until the legal right be ascertained. If there be equitable grounds on which the jurisdiction of this Court ought to be withheld, that is a subject-matter

(a) See *The River Dun Navigation Company v. The North Midland Railway Company*, ante, p. 158.

connected solely with the jurisdiction of this Court. I abstain from giving any opinion upon the legal rights of the parties in this case, because it is my intention to put them into a course of legal investigation: it is sufficient for the present purpose, that I see grounds for inquiry before another tribunal as to what are the rights and powers conferred by the act. I see a road, a small one no doubt, and perhaps at present only applicable to a very limited purpose; namely, the means of communication with what is at present land applied to agricultural purposes. It may, however, be of great importance to the proprietor to preserve this road, in case he should hereafter apply this land to other purposes. It is quite immaterial to the duty I have to perform, whether it be of more or less value to the proprietor, if it be a road which by the act he is intitled to have protected; at least, until he has had an opportunity of trying at law whether he is so intitled or not. It is beyond all doubt a road, within the meaning of the act of Parliament. On that point there can be no question; but the question is, whether the road which is proposed by the Company to be substituted for this road, be or not such a substitution as, under all the circumstances of the case, comes within the provisions of the act. As to that I give no opinion, because I think that it is precisely a subject-matter for the investigation of another tribunal. It will depend much upon local situations, with regard to which I can have but imperfect information, and which a jury will have a much better opportunity of deciding upon than I can possibly have.

It is then said that there are certain equitable circumstances which preclude the plaintiff from asserting his legal right, namely, that he has in fact received compensation for the road; that, whether he has or has not included the soil in the purchase which the Company have completed of the adjoining land, the jury have, in giving compensation, estimated the value of this road to the plaintiff,

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that is, have considered the damage which other parts of his estate would sustain by having these parts cut off from the body of the property. Now, I find, that, when the parties went before the jury, the notice was this, "I do hereby, on behalf of the London and Brighton Railway Company, give you notice that the property described or referred to in the plan hereunto annexed, and therein coloured green, will be taken and used for the purposes of the act." What, therefore, the jury had to do, was, to assess the value of the land coloured green, and compensation for damages, which of course means the damage the other property would sustain by reason of the part coloured green being taken. A plan was submitted to the jury, and on it there are certain portions marked green,—accurately, therefore, coming within the description of the notice; and, across the property so coloured, there is a road marked, the colour of which is white. There is no notice to take anything but what is coloured green. Whether there is the admeasured quantity of land which was required, seems to be disputed between the parties; but, in the view I take of the case, it is quite immaterial, whether the admeasured quantity of land supposed to be or actually contained in the parcels proposed to be purchased, did or not include the property under the road; it is quite clear, that, in the plan which the jury had before them, the road is not coloured so as to be included in the purchase. I must, therefore suppose, that, for the purpose of estimating the value of the property, the jury had in view what the Company themselves submitted to them, namely, a plan marking the road as a right to be preserved. When, therefore, they came to estimate the value of the property, the road was not in question; they could only look at the land coloured green: but, when they came to estimate the damage which might be sustained by the property being so taken, if that road had not been on the plan, and it had therefore appeared that the taking

that which was marked on the plan, including the site of the road, cut off the rest of the property from the street called Cheapside, it might have been very possible that the jury would then have had the necessary facts before them, and might have been supposed to have estimated the damage sustained by the rest of the property, including the circumstance of its being cut off from Cheapside, by taking that portion which forms the site of the road. When the jury have before them the plan marking the road, preserving, therefore, the communication,—there being no evidence that anything was laid before the jury on either side for the purpose of intimating to them that they were to value the rest of the property on the supposition that the road was to be taken away, I must assume that they estimated the damage according to the plan submitted to them, and that they estimated the damages on the supposition that the road was to be preserved. It is, however, part of the case, although it does not appear in evidence that the fact was before the jury, that, in the negotiations between the plaintiff and the Company, the agents of the plaintiff did expressly state that they reserved the road, making it not very probable that without any further communication either party should have understood that in purchasing these pieces of land the road was to be considered as abandoned. I cannot think that anything has taken place which precludes the plaintiff from asserting his legal rights. If he has not sold this road to the Company, the question arises, what are the existing legal rights?—the question of convenience to the Company is a matter quite immaterial. I have no power, and if I had I should not exercise it, to deprive one party of what he is entitled to, because it is inconvenient to another party. The Company may or may not have taken proper measures to secure to themselves those powers which are necessary for the sake of convenience in carrying their works into effect; if they have not, it is their

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misfortune. These Companies procure ample powers to be bestowed upon them; but it not unfrequently happens, that, in the course of their works, they find that they have not powers sufficient for perfecting all they contemplated. When that is the case, they must either make what bargain they can with the persons whose rights are adverse to them, or they must again apply to Parliament to have their powers enlarged. I do not sit in this Court to enlarge those powers, but to keep both parties within the limits which the legislature has prescribed.

I have nothing now to do but to consider in what way this purely legal question can be best decided, namely, whether the road proposed to be substituted by the Company is, within the meaning of the act, a proper substitution for the road proposed to be taken. I shall, therefore, now grant an injunction against any interference with the road for the present, — the plaintiff undertaking to bring an action against the Company; and the Company admitting, for the purpose of the action, that they have taken the old road; the plaintiff admitting that the substituted road is in effect completed, so as, if it be a substitution, to try the question whether it be a proper substitution. This will, I apprehend, try the only question between the parties.

[It was submitted by the counsel for the Company, that the form of action would not inform the Company what kind of road they were bound to make.]

THE LORD CHANCELLOR.—I am not about to direct an action to try what sort of road the Company are to make. The question before me is, whether the proposed road is such as, under the act, entitles them to take the old road.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1839.

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June 21st.

IN Easter Term, Sir *J. Campbell*, Attorney-General, obtained a rule calling upon the Company to shew cause why a writ of *mandamus* should not issue directed to them, commanding them to proceed to make and complete a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, according to the provisions of an act of Parliament made and passed in the 6th and 7th years of the reign of His late Majesty William the Fourth, intituled "An Act for making a railway from London to Norwich and Yarmouth, by Romford, Chelmsford, Colchester, and Ipswich, to be called 'The Eastern Counties Railway,'" and of another act of Parliament made and passed in the 1st and 2nd years of the reign of Her present Majesty, intituled "An Act to amend and enlarge the powers and provisions of the Act relating to The Eastern Counties Railway;" and especially, to set out and define the line of the railway, (particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth),¹ deviating to purchase lands on the remainder of the line (from C. to N.), pursuant to the provisions of the act.

Where a Company who had obtained an act of Parliament for making a railway from L. to N., had only purchased lands and commenced works on a part of the line (from L. to C.), and it appeared doubtful from the circumstances stated on affidavit, whether the Company intended to proceed further than C., a *mandamus* was issued, calling upon them to complete the whole line, to set out any proposed deviations from the original line, and to proceed

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from the line laid down on the plans in the last-mentioned act; and to proceed to purchase the lands necessary to the making and completing the railway, lying between Colchester and Norwich, and Norwich and Yarmouth, pursuant to the provisions of the two several acts of Parliament in that behalf contained.

It appeared from affidavits made by several of the shareholders, proprietors of lands to be taken for the railway, that certain measures had been adopted at Ipswich, Great Yarmouth, Norwich, and other places on the contemplated line, by the promoters of the bill, and that a prospectus was issued by them, shewing throughout their intention to complete the line; on the faith of which assurances the deponents were induced to become subscribers, and the bill was carried through Parliament. That resolutions were passed at public meetings, and correspondence took place, previously to the passing of the second act, from which it appeared, that the directors had then determined not to proceed to purchase lands beyond Colchester; but that, upon the interference of the deponents, the directors assured them the line should be completed, and they withdrew their opposition accordingly. That no steps had since been taken in the county of Suffolk—through which the railway, when completed, would pass for fifty miles—to purchase lands or set out deviations required for the purpose of the line of railway on certain property where such deviations were necessary; and that the time for doing so was near expiring. That the completion of the line was essentially necessary to the counties of Norfolk and Suffolk, and was the basis of the undertaking, previous to obtaining the original act; but that no lands had been taken in those counties. That, if the line were not set out before the 27th of July, the completion of it would be impossible. That £600,000 had been paid up out of a capital of £1,600,000, and therefore, the Company had

ample means of defraying the expenses of setting out the line and purchasing the lands; but that the directors had prejudicially confined their operations to that part of the line between London and Colchester, and it was their determination not to proceed further. That an application had been made to two of the directors, requiring a pledge that the line should be completed, which was refused; but that the Board of directors had given for answer that they were proceeding as far as the interests of the Company seemed to require. That deponents were informed and believed that the directors had pledged themselves to a resolution, to the effect that they would not expend any more money beyond Colchester, without taking the sense of the shareholders on the subject; that it was not their intention to proceed beyond Colchester, unless compelled so to do; and that their delay in setting out the deviations was wilful, in order to render the compulsory powers of the act nugatory.

The affidavits of the chairman, directors, and engineer of the Company, in answer, admitted several of these statements, and proceeded to say, that they were informed and believed that the power to make deviations from the centre line of the railway was a power resting in the discretion of the directors, and not a power which they could be compelled to exercise. That, in making the line of the railway from London into and through the counties of Norfolk and Suffolk, deviations in the line would not be necessary. That the period for the compulsory purchase of land for the purposes of the undertaking, (by the 1 & 2 Vict. c. 5, extended to the term of two years) would not expire until the 27th of July, 1840; and that the period of one year for setting out and defining these deviations would not expire until the 27th of July, 1839. That the directors of the Company had proceeded in the execution of the powers contained in the said acts on

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their part to be performed, to the best of their judgment and ability; and had been actively engaged in prosecuting the works connected with and appertaining to the railway; and had considered that the best course for the advantage of the proprietors and shareholders thereof, and for the benefit of the public at large, was, to make the line continuous from London to the interior of the districts through which the railway was intended to pass; finishing and opening portion by portion, as in their judgment should seem most expedient, and best calculated to promote the prosperous issue of the undertaking, and the interests of the proprietors, shareholders, and public. That, with the determination of acting upon such principle, the directors intended opening the railway between London and Romford during the then present month of June, and proceeding with the railway from Chelmsford, to meet the line then in progress from Romford towards Chelmsford. That the directors had agreed for the purchase of the lands required for the line from London to Colchester, and for some miles beyond, but no further; but that they retained the power of purchasing all such further portions of land as might be requisite for the continuation of the line. That it is usual and customary for directors of railway companies to apply from time to time to Parliament, if authorized by the shareholders, for an extension of time for the purchase of lands. That, to the best of their knowledge, without raising further and additional sums by the authority of Parliament, the Company would not be able to complete the railway; and that it would not be prudent in the directors to expend monies in the purchase of further lands; but, on the contrary, all and any such purchases would be injurious to the completion of the undertaking; inasmuch as all the funds then available under the acts might be employed more beneficially for the public, in completing the works then in hand, extending over the land already purchased,

whilst the purchase of other lands could only exhaust the resources of the Company.

That the total number of shares subscribed for, and taken and held by persons in the counties of Norfolk and Suffolk, was only 562, or thereabouts, amounting, when fully paid up, to £13,050. That about 40,000 shares in the Company were held by persons residing in the county of Lancaster, and it was believed that they and the shareholders generally (except the persons making the affidavits in support of this rule) entirely approved of the course pursued by the directors. That general meetings of the shareholders were held half-yearly; and that at no one of such meetings was any resolution passed or proposed disapproving of the course pursued by the directors; but, on the contrary, it had received their cordial approbation. That they were advised that the mode and management of constructing the line, and carrying out the undertaking, were vested in them solely, subject to the control and direction of the shareholders of the Company.

The clauses in the act 6 & 7 Will. 4, c. 106, relied upon in the argument, are the following:—

Section 1. “That the parties herein named, and all other persons and corporations who have subscribed or shall hereafter subscribe towards the said undertaking, and their several and respective successors, &c., shall be, and they are hereby united into a Company, for making and maintaining the railway and other works by this act authorized, and for other the purposes herein declared, according to the provisions and restrictions hereinafter mentioned; and for that purpose shall be one body corporate, by the name and style of “The Eastern Counties Railway Company,” and by that name shall have perpetual succession and a common seal, and shall and may sue and be sued; and also shall have power and authority to purchase, hold, and sell lands, for the use and benefit of the said under-

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taking, without incurring any penalties or forfeitures; and shall also have and exercise all other powers and authorities which are hereinafter given or mentioned."

By sections 3 and 5, the sum of £1,600,000 is to be raised and applied for making the railway and other works. By section 6, the Company are empowered to make and maintain the railway as delineated in the Parliamentary plans, commencing at London and ending in, at, or near Norwich and Great Yarmouth. Sections 54 and 55 enact that the lands to be taken for the line of the railway shall not exceed twenty-two yards in breadth, and give power to deviate from the delineated line to the extent of one hundred yards. By sections 130 and 131, first and other general meetings are to be held in February and August in each year, and all meetings of proprietors are to be specially convened. Section 144 defines the powers and duties of directors. Section 220 enacts that the whole of the capital shall be subscribed for before the compulsory powers of the act are put in force. Section 222 enacts, that, if the land be not contracted for within two years, the power to take the same by compulsion shall cease. Section 223 enacts, that, if the railway be not completed within seven years, the powers of the act are to cease, except as to such part as shall be completed. Section 252 gives power to increase the capital stock, by raising the amount by shares; and section 254 provides, that, if the railway be abandoned, the land shall revert to the adjoining owners.

By the act 1 & 2 Vict. c. 81, s. 2, it is enacted, "That the time by the said recited act (6 & 7 Will. 4, c. 106,) limited for the compulsory purchase, taking, or using of lands, for the purpose of the said undertaking, shall be, and is hereby extended and enlarged for the further term of two years, to be computed from the expiration of the period for that purpose limited by the said recited act. Provided always, that, after the expiration of one year from the passing of this act, it shall not be lawful for the Com-

pany to deviate the centre line of the said railway, as laid down in the plans thereof referred to in the said recited act, unless the Company shall, at the expiration of the said period, have set out and defined their line deviating from the line laid down on the said plans as aforesaid; and, in such case, the line so laid down and defined shall be the line to be adopted by the Company without deviation therefrom."

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Sir F. Pollock, R. Alexander, and Austen, now shewed cause (a). The defendants are under no obligation to do what is asked; or, if they are, cannot be compelled to do so now. This rule, therefore, ought to be discharged. *Blakemore v. The Glamorganshire Canal Company* (b); *Rex v. The Inhabitants of Cumberworth* (c). An application is made to the Company, on behalf of shareholders, being also landowners and occupiers, inquiring whether it is their intention to proceed, and requesting them to set out the deviations intended, before the 27th of July then next. The answer is, that the Company are fulfilling their duties, and do not recognise any authority in the shareholders to make such demands; and there is great reason to resist them. *Lee v. Milner* (d). The capital of the Company is £600,000, in upwards of 40,000 shares, of which thirty-eight shares only are in favour of their application.

The discretion as to carrying the act into effect is vested in the directors alone; and, as soon as the act was passed, the minority were bound by the opinion of the majority. The directors have thought it advisable to make continuous lines, opening each as they think best and the funds of

(a) June 10th, before Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

(b) 1 Myl. & K. 162.

(c) 3 B. & Ad. 108; 4 A. & E. 731; and 1 Nev. & P. 197.

And see *The River Dun Navigation Company v. The North Midland Railway Company*, ante, p. 135.

(d) 2 M. & W. 824; 2 You. & Coll. 618.

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the Company allow: and such plan is the most judicious. The Company have not funds sufficient to complete the line throughout, still less to purchase the land for that purpose; they must, therefore, complete those parts which will provide them with funds sufficient to enable them to finish the remainder. This mode of proceeding was embodied in the report presented in February, 1838, to the shareholders, wherein the directors stated their intention to begin at the London terminus, and proceed afterwards as their means would allow. The line from London to Chelmsford was calculated to be the most profitable, and was therefore taken in hand first. The power to make deviations is vested in the directors: why should they be called upon to lay down and define these,—especially when it is sworn in the affidavits that no deviations are intended? The powers of purchase given by the act do not cease till 1840: and therefore the Company cannot be compelled to make those purchases now, especially as the land reverts to the owners if the railway is not completed. The affidavits contain complaints that the hopes and expectations of the subscribers have been disappointed: that may be ground of regret, but is not a case for the interference of this Court.

Sir J. Campbell, Attorney-General, *Cresswell, Kelly, and O'Malley*, contra.—The act of Parliament conferring power to make the railway from London to Yarmouth, constitutes a bond between the adventurers and the public to complete the whole distance. If it had appeared that they intended to stop at Colchester, the act might not have passed; certainly those subscriptions would not have been received which were entered into on the supposition of the benefit to arise to the counties of Norfolk and Suffolk. Lord Eldon has said, in *Blakemore v. The Glamorganshire Canal Company* (a): “These acts constitute a contract

(a) 1 Mylne & K. 154.

between the public and the directors;" and a specific performance of this contract is now required.

In the case of *Rex v. The Inhabitants of Cumberworth* (a), a road was to be made from point A. to point B., with branches, and it was held that the repairs on a portion of the road were not to be done by the parish, unless the whole extent was finished. If an act is to be done under a statute within a certain time, and a *mandamus* is applied for after that time, the Court cannot interfere. The argument is, that the Company intend to evade their duty, and it is no answer to say, no deviation is intended; for, unless the deviations are set out before July next, we shall be too late in our application for a *mandamus*:—the object is, that active proceedings may be set on foot. No part of the act releases the Company from the conditions upon which they obtained it. *Rex v. The Birmingham Canal Company* (b) furnishes no rule; there the largest discretion was given. In the case of *The South Level Drainage Commissioners* (c), there was a *mandamus* to complete certain works; the answer was, that only £50,000 was allowed, and that £40,000 had been expended. The Court said the Commissioners were bound to provide themselves with funds, and made the rule for a *mandamus* absolute. The term 'specific remedy,' means a specific *legal* remedy, and has been so held in all the cases, from *Blake-more v. The Glamorganshire Canal Company* (d) down to *Lee v. Milner* (e). If the *mandamus* issue, and the Company return that they have no funds, that they are going on *bonâ fide*, or that they intend no deviations, then there will be an opportunity either of traversing their return or of producing evidence to shew that they ought to be com-

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(a) 3 B. & Ad. 108; 4 A. & E.
731; and 1 N. & P. 197.

(b) 2 W. Black. 708.

(c) Not reported.

(d) 1 Myl. & K. 162.

(e) 2 M. & W. 824; 2 You. &
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pelled to complete their contract. *Rex v. The Severn and Wye Railway Company (a).*

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This is an application for a *mandamus*, to do certain acts therein specified; and it was observed on both sides, in the course of the discussion, and we think with truth, that the questions involved in it are of much novelty, and of at least equal importance; because, as, on the one hand, much mischief may ensue if this Court should improvidently enjoin the performance of things impracticable or improper, so, on the other, is there no higher duty cast upon this Court than to exercise a vigilant control over persons intrusted with large and extensive powers for public purposes, and to enforce within reasonable bounds the execution of such purposes, in compliance with such powers; and the more so, as we are not aware of any other efficient remedy. The principles, upon which these powers are conferred by the legislature upon undertakers of this description, are now so fully understood that it is not needful to do more than generally to refer to them. They are thus laid down by Lord *Eldon*, in the well known case of *Blakemore v. The Glamorganshire Canal Company (b)*,—"I apprehend, those who come for these acts of Parliament, do in effect undertake that they shall do and submit to whatever the legislature empowers or compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals." The same doctrine was acted upon by this Court, in its fullest extent, in the case of *Rex v. The Inhabitants*

(a) 2 B. & Ald. 646.

(b) 1 Myl. & K. 162.

of *Cumberworth* (a). It remains only to be added, that these cases and principles have been recently recognised by the Court of Exchequer, in the case of *Lee v. Milner* (b).

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The reasons also which regulate the practice of this Court in regard to writs of *mandamus* are very plain and intelligible. This interference is occasioned by inferior courts or persons refusing to proceed in some course prescribed by law, and not in consequence of any misapprehension or error in their course, provided they have entered upon it. And accordingly, if it had appeared that the Company were substantially complying with the terms of their undertaking, there would have been at once a satisfactory answer to the application. Now the objects and purposes for which the Company have been incorporated and empowered, or which (in the words of the passage cited) "the Legislature has empowered and compelled them to do and to submit to," are too clear to admit of any doubt. The title of the act itself is, "for making a railway from London to Norwich and Yarmouth;" and the preamble recites, that the opening of an additional certain and expeditious communication, not only between the towns there particularly enumerated, but also between the Metropolis and the eastern districts of the kingdom, would be of great public advantage; the eastern terminus being a seaport of greater consequence than any in the eastern districts. The act then gives a minute description of the whole line, and a particular enumeration of all the places through which it is to pass; so that all question on this matter is entirely precluded. We consider it to be equally undeniable, that to carry the railroad through a portion only of the prescribed line,—such as a third or a half,—is a nominal, not a real compliance with the meaning of the act of Parliament. We are aware, that we

(a) 2 B. & Ad. 108.

(b) 2 M. & W. 824; 2 You. & Coll. 618.

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are met in this part of the argument by remarks upon the difficulties or impossibility attending the execution according to the prescribed terms. We confess, however, that we should have felt more pressed by observations of this nature, if we had not observed in the preamble of the act, which we must consider to have been proved, that certain persons therein named (and we consider the obligation as extending to their successors, who may from time to time constitute the Company) were willing at their own costs and charges to carry the said undertaking into execution. Such difficulties, be they more or less, should have been duly estimated before the undertakers pledged themselves to the execution, for the sake of obtaining such large and extensive powers as most certainly are vested in them for the purposes already mentioned. It was objected also, that the time of completing the work is not quite elapsed, and the time for determining the line has not yet arrived. We were also referred to parts of the act, and particularly to the clause revesting the land taken for the line in the proprietors on each side, as indicating that the non-completion of the work was obviously within the contemplation of the Legislature. We think, however, that a failure of the enterprise, upon experiment and trial, which may of course happen to any scheme however plausible or promising, is widely different from a design to abandon one part of the line, and to execute another, which it may be found more easy and profitable to accomplish.

We now come to consider, whether, as far as appears to us, there be a *bond fide* purpose of completing the work. And upon this part of the case, after making every allowance for the discretion to be exercised by the Company as to the different degrees of exertion to be made in different parts of the line, it is impossible not to be forcibly struck by the different state of things beyond Colchester, and between that town and London. Beyond, we can

discover no activity, whereas between London and Colchester we are given to understand that the whole line is in a state of great forwardness. The procuring land for the line is usually, we believe, as reasonably might be expected, the first step in this course, and yet in that preliminary measure, the preparation beyond Colchester we assume to be comparatively small and insignificant. Moreover, when we consider, how indispensable for purposes of this description is the compulsory power of procuring land, (because without that the obstinacy or caprice of a single individual may put a stop to the work at once), we cannot help thinking that the answer of the Company, to a request that they would set out and define their line deviating from the line laid down in the plans, (a mere precautionary measure to secure compulsory purchases), that no deviation is requisite, is much more consistent with a determination not to proceed, than with a well-founded belief that the original plan could have been laid down with such perfect accuracy as in working to require no deviation at all.

Another argument against our interference was drawn from the power given to general meetings of the Company, to decide upon the expediency of all measures to be adopted for executing the act of Parliament; but we must consider the real nature of this application. It is not a complaint by a majority of proprietors against the governing body, but by a minority against the conduct of the Company itself, which they charge substantially with a breach of faith towards them, by stopping short of a *bond fide* execution of that purpose which induced them to become subscribers. They strongly urge upon us the consideration, that all the sacrifices which they may have made in furtherance of their own interests may go unrequited, or even may entail upon them additional loss, by giving advantages to others in which they cannot share. To say that a majority of the whole body are satisfied with the dividends

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they are likely to receive, and are unwilling to risk more expenditure, is obviously no answer to them, or to the public, who created their great powers for different purposes, or to Parliament, which was induced to grant them by the promise of public benefits much more extensively diffused.

Upon the whole, without coming to any final decision, we think the case is involved in sufficient doubt to require a return to the *mandamus*, and that the writ should go for that purpose.

Rule absolute.

COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1839.

THE QUEEN

against

THE MANCHESTER AND LEEDS RAILWAY
COMPANY.

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Nov. 19th.

IN Michaelmas Term, 1838, *Starkie* had obtained a rule *nisi*, calling upon the Manchester and Leeds Railway Company to shew cause why a writ of *mandamus* should not issue directed to them, commanding them to make and excavate the turnpike road leading from Oldham to Rochdale, in the county of Lancaster, on both sides of the railway viaduct over the said road near Rochdale, the whole width of forty-two feet, being the width of the turnpike road previous to the alterations made therein by

By a Railway Act it was provided, that the Company should not carry the railway across a certain turnpike road, except by means of a bridge, of the width of thirty feet, so as to form a clear carriage road under the bridge of the width of twenty-four feet, with a footpath of six feet, and of the height of eighteen feet from the under side to the surface of the road; and that in case it should be necessary to lower the bed or surface of the road, it was to be so effected, that the ascent on the road should not exceed one foot in fifty on the south side of the bridge, and one foot in a hundred on the north. That the Company should make new fences and drains, and relay and reform the road; and that the alterations should be made under the superintendence and direction of the trustees of the road.

The Company made a bridge over the road, and lowered the surface under the bridge to the depth of nine feet, giving the required ascent on each side; but instead of making the bed of the new road forty-two feet wide, (the width of the old road), they made a sunken carriage-way of thirty-five and a-half feet in width on the north, and of twenty-four feet under and on the south side of the bridge; leaving the footpath at the original level, and having reduced its width in some places from six to three and a-half feet by making steps descending to the carriage road.

Held, that such works of the Company were not a compliance with the act; and the rule for issuing a *mandamus* was made absolute.

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the Company, for so far in length as the excavations of the Company extend; and to make such alterations in the works of the Company now executed as shall be requisite for making and effecting such excavations as aforesaid; and to abstain from proceeding to complete a viaduct, and the walls along the side of the road, until they shall have excavated and completed the road to its former width of forty-two feet; and to remake the road in a proper and substantial manner.

The application was made on behalf of the trustees for making, maintaining, repairing, and improving the Manchester and Oldham roads (under 7 Will. 4, c. xliii.). It appeared from the affidavits in support of the application, that the Manchester and Leeds Railway Company were incorporated by an act 6 & 7 Will. 4, c. cxi., and that, after the passing of that act, it was found necessary that certain portions of the line of the railway should be varied, and amongst others a portion of the line crossing the turnpike road from Oldham to Rochdale. That a second act was accordingly passed, (7 Will. 4, c. xxiv.), by the 38th section of which, after reciting that the new line of the railway would cross the turnpike road leading from Oldham to Rochdale at a different place from that specified in the former act, and near to the new branch of the Rochdale Canal, where the turnpike road was nearly on a level; and that it would be necessary to lower the bed of the road at the place where the railway would cross the same, in order to maintain a proper level in the line thereof, and to allow of a sufficient space under the bridge whereon the railway was to be carried across the road, for the passage of coaches, waggons, and other carriages along the road, and that it was expedient that provision should be made for preserving a proper level on the road; it was enacted, that it should not be lawful for the Company to carry the line of the railway or to make the same across the road, unless the same should be carried and made at their own expense

over the road, by means of a bridge, of the width of thirty feet at the least, for the purpose of forming a clear carriage road of twenty-four feet wide, and a footpath of six feet wide, (exclusive of the pillars or piers which might be placed between the footpath and the carriage road), and of the height of eighteen feet at least from the surface of the road to the under side of the bridge, so as to leave a clear and uninterrupted headway under the bridge of eighteen feet at the least; and that the bridge on the under side thereof should be made horizontal, and not arched, for the whole space of twenty-four feet wide at the least, over the carriage road; and that, in case it should be expedient to lower the surface of the road for the purpose aforesaid, then it should not be lawful for the Company to lower or alter the then present bed of the road unless the same should be lowered, at their expense, on both sides of such bridge, so that when the alterations should be completed, the ascent on the road southwardly from the bridge, so far as the alterations therein should extend, should not exceed one foot in height for every fifty feet in length, and so that the ascent of the road northwardly from the bridge should not exceed one foot in every hundred feet on any part of the road so to be made or altered; and that the Company should at their own expense make all the new, and alter all the existing fences, drains, and works, and relay and reform the road, and perform all other matters and things that might be rendered necessary for the forming of the railway; and also, at their own expense, make and at all times keep in repair good and sufficient drains or culverts for the purpose of draining and laying dry so much of the road as should be lowered or altered as aforesaid; and that the alteration of the surface or bed of the road should be so made and constructed under the superintendence and direction of the trustees of the road, or of the surveyor or other person authorized by them to act on their behalf in the premises.

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That the Company had constructed a bridge or viaduct, for carrying the railway over and across the road, and had lowered the bed or surface thereof so as to form a hollow or scoop, having the deepest part, which was nine feet below the former level of the road, immediately underneath the bridge or viaduct, so as to afford a passage with the requisite headway for carriages under the same, and extending from a point in the road two hundred and thirty-six yards on the north of the bridge or viaduct, to another point in the road two hundred and one yards on the south thereof, making in the whole four hundred and thirty-seven yards of the bed or surface of the road; but that, in thus altering or lowering the bed or surface of the road, the Company had not lowered it throughout its entire breadth of forty-two feet, but only as to a certain portion of the breadth, so as to form a sunken carriage way of thirty-five feet six inches in width on the north side, and twenty-four feet in width on the south side of the bridge, and at the part immediately under the bridge of the breadth of twenty-four feet; and leaving a portion of the road at its former level on the side of the sunken way, that is to say, on the east side, six feet in width, for the whole length of the excavated road, for a footpath; and for the distance of two hundred and one yards on the west side, of the width of twelve feet; and in the footpath on the east side, the Company had constructed flights of steps in the raised footpath, at six different places, descending into the carriage road, thereby at such places contracting the footpath of six feet wide to three feet six inches wide only, and rendering the footpath both dangerous and inconvenient; and that, although the footpath was so raised above the carriage-way, yet the Company had not erected any sufficient rail or protection along the edges for the security of passengers, neither had they laid down the new surface of the road in a proper and sufficient manner, nor constructed sufficient drains. That the road, before and at

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the time of the alterations, was a good and well-drained road, in all respects safe and commodious, and was of the breadth of forty-two feet, of which a space of six feet on the east side was assigned as a footpath, and the remaining thirty-six feet formed the carriage road, both carriage and footway being throughout on one and the same level; and that the alterations would not only render the road incommodious and dangerous to the public, but that they were calculated to increase the difficulty and expense of keeping that portion of the road in good order and condition. That the trustees highly disapproved of and objected to the alterations, and that their surveyor had frequently, while the works were in progress, expressed to the Company his entire disapprobation and disapproval thereof; and that the trustees had frequently called upon the Company to comply strictly with the provisions of the act.

By affidavits in answer it was alleged that the Company had purchased land on each side of the road to enlarge the footpath, which could not have been lowered without seriously injuring the property of other persons, and endangering several dwelling-houses adjoining the footpath, as well as making the entrance into them extremely inconvenient. That the alterations in the carriage road were completed in January, 1839; and that the footpath was then supported at its original level by a stone wall, and protected by a railing, and was of the width of six feet, exclusive of a space belonging to the owners of the adjoining houses, and that the whole was then in a perfect state of repair.

Cresswell, Sir *W. Follett*, and *Tomlinson* now shewed cause (a). This is not a case for a *mandamus*. A reference to an engineer would have been a more proper proceeding, or the trustees should have indicted the Company. The

(a) November 8th, before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

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statute 6 & 7 Will. 4, c. cxi., s. 38, as amended by 7 Will. 4, c. cxxiv., authorized the lowering of this road. In pursuance of that authority, the Company have made a carriage-way under the bridge, twenty-four feet wide and eighteen high, besides a footpath six feet wide on each side, with railings and flights of steps for the protection and convenience of foot passengers. The trustees ask to have the road excavated to a width of forty-two feet. They admit the rise of the road is correct, but object that the footpath is not lowered. This cannot be done without great injury and annoyance to individuals, and considerable danger to the houses along the side of the road; for if this excavation is made, the doors will open upon an abrupt descent of nine feet. It was never intended by the act that the footpath should be lowered. The Company have altered the turnpike road according to the directions of the statute, and that is all they are required to do. It may have been true that the surface of the carriage road was not sufficiently made when this rule was applied for, and which was long before the Company had completed their works; but now the road is perfectly good.

Sir *J. Campbell*, Attorney-General, *R. Alexander*, and *Starkie*, contrà.—This is a proper case for a *mandamus*, and the liability of the Company to indictment is no bar to the application. *Rex v. The Severn and Wye Railway Company (a)*. The object of the Company has been, to save the expense of purchasing the adjoining land, by narrowing the lowered level of the road and leaving the footpath in its original state. If they had lowered the footpath and left it unobstructed, they must have purchased land adjoining in order to make steps and approaches to the houses on the roadside. In order to avoid that, they have imposed upon the public a turnpike road, of which the footpath varies in height up to nine feet above the

(a) 2 B. & A. 646.

road itself, being at intervals only three feet and a half instead of six feet wide; besides this, the road is insufficiently made, and being less exposed to the influence of the sun and wind, and the drains badly laid down, the future expense of repairs will be considerably increased. In consequence of these alterations, instead of thirty-six feet of carriage road and six of footway, there is now altogether only thirty-five feet on the north side, and thirty on the south. The trustees contend that the word "road" in the statute includes footpath, and that the public ought not to be deprived of a right, or prejudiced in their enjoyment of it, without either express enactment or necessary inference. Section 38 (*a*) does not give the Company any power to narrow the road except under the viaduct; and section 44, which allows it to be narrowed to thirty feet in some places, only applies to a diversion of the road, which does not exist here, and therefore those powers do not apply (*b*).

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Cur. adv. vult.

LORD DENMAN, C. J.—We think the rule for a *mandamus* ought to be made absolute.

Rule absolute.

(*a*) 7 Will. 4, c. 24.

(*b*) See the case of *The Attorney-General v. The London and South-*

ampton Railway Company, ante, 302.

RAILWAY CASES.

IN THE COMMON PLEAS.

In Michaelmas Term, 1839.

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Nov. 22nd.

THE LONDON AND BRIGHTON RAILWAY COM-		
PANY	against	WILSON.
The SAME	against	FAIRCLOUGH.

In an action for calls on railway shares, the Court refused to allow the defendant to plead, 1st, that due notice of the calls was not given, pursuant to the act of Parliament; 2ndly, that no time, place, or person was appointed for the payment of the calls; 3rdly, that the calls were made for other purposes, than those mentioned in the act; 4thly, that the Company had made deviations not warranted by the act, and that the calls

were made for the purpose of those deviations; 5thly, that at the time of making the calls there were not 36,000 shares in the Company, as provided by the act.

THESE were actions in debt for two calls on certain shares in the London and Brighton Railway Company, brought against the defendants as proprietors of such shares.

The defendant Wilson pleaded, 1st, that he never was indebted; 2ndly, that he was not nor is the proprietor of the said shares.

The defendant Fairclough pleaded the same two pleas, and also (by leave of *Erskine, J.*) 3rdly, that fewer shares had been issued by the Company than were required by the act of Parliament (a).

In this term, *Crompton* had obtained a rule *nisi*, calling upon the plaintiffs to shew cause why the defendant Wilson should not be at liberty to plead the several matters following, in addition to the two pleas allowed to be pleaded

(a) A cross rule was applied for by the plaintiffs to strike out this plea.

in this cause; namely, 3rdly, that due notice of the calls was not given, according to the act of Parliament; 4thly, that no time or place was appointed for the payment of the calls, nor persons to whom they should be paid; 5thly, that the calls were made for other purposes than those mentioned in the act.

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Cowling had obtained a similar rule for Fairclough, who also applied to be allowed to plead, that the Company had made deviations in constructing their line not warranted by the act, and that the calls were made for the purpose of those deviations.

Wilde, Serjt., and *Swann*, for the plaintiff, now shewed cause (a). These pleas relating to the making of the calls are unnecessary under section 6 of the act (1 Vict. c. cxix.), for all these things must be proved by the plaintiffs. The effect and purport of the 5th plea is merely to disturb the accounts of the Company, and make them the subject of inquiry in a court of justice, which is a jurisdiction the Court does not assume. Under section 172, the shareholders have the power to call a general meeting, upon giving twenty-one days' notice, and that is the proper place for such objections. No question of deviation such as is sought to be raised can arise between these parties; that question is not contemplated as capable of arising between the shareholders and directors, but between the Company and the public, or those persons whose property is affected by the deviations. As to the plea, that fewer shares have been issued than were required by the act, the power of granting shares is given by sections 135 and 138, whereby the number is fixed at 36,000, which is therefore the number of the existing shares; the fact of a less number having been sold is not

(a) Before *Tindal*, C. J., *Bosanquet* and *Maule*, Js.

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attributable to the directors, who cannot therefore be made answerable for it.

Crompton and Cowling, contra.—The defendants are not entitled under general pleas to put in issue the facts on which they rely. The power to make calls is conferred in general terms, and the proof of the facts stated in the pleas will lie on the defendants. The Court will not, therefore, reject them unless they are clearly so bad that they ought not to be placed on the record. This is not a question of pleas bad on demurrer. The clauses of deviation were meant to operate as well between the directors and proprietors as with reference to the public, for the subscribers would have to pay for the deviations: *Reg. v. The Eastern Counties Railway Company (a)*. With regard to the plea of fewer shares being issued, than is mentioned in section 13, the meaning of the act was, that the undertaking should be done in a certain manner; the defendants took shares on that understanding, and those conditions ought to be carried out.

TINDAL, C. J.—It appears to me that the power which we are called upon to exercise as to certain pleas being allowed, and which is given to the Court by the statute of Anne, is discretionary. I think that the pleas sought to be put on record by the defendant in this action are such as do not involve the real justice of the case, and such, moreover, as would lead to great expense; and, therefore, that in the exercise of our discretion we ought not to allow them to be pleaded, upon the principle acted upon by the Judges of this Court in the case of *Currie v. Almond (b)*. The question is, whether these are pleas which, looking at the statute of Anne, we ought to allow to appear on the record as an answer to the claims made, and I think that none of them should be allowed.

(a) Ante, 509.

(b) 5 Bing. N. C. 224.

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The first two pleas are quite unnecessary, because, in fact, the subject-matter which they propose to deny must be shewn by the plaintiff himself in the evidence which he must give in support of the declaration. The first plea is, that no due notice of the calls was given according to the act of Parliament; and the second is, that no time or place or person was appointed at which and to whom the calls were to be paid; and, looking at the 148th section of the statute, it is expressly thrown on the plaintiff that at the trial he shall give proof of these two facts. It says, after providing for the mode of declaring, "And on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this Act of such call or calls having been made." Now this is only provided for in the negative it is true, "it shall only be necessary," but it is in effect directly ordered, and the plea here already pleaded, of never indebted, will clearly call upon the plaintiff, before this debt can be recovered, to perform those conditions which are imposed upon him.

The third plea sought to be pleaded, is, that the calls were made for other purposes than those mentioned in the act. The question is, whether that plea could, with any degree of justice to the parties who are concerned in this litigation, be put on record. It would be exceedingly difficult to prove it if the proof were thrown on the plaintiff. Who could shew what were the intentions of the parties when the money was called for, and would they be at all material if they could be shewn? The only effect of it might be, that even if it could be proved that it was called for with a different object from that authorized, the intention was not carried out. But the act has made calls, where properly made, a debt to the Company from the

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defendant, and it has limited it to that, because it says, after the provision which I have already read, and in the same section, " And the said Company shall thereupon be entitled to recover what shall appear due, including interest, &c." It is observable, in fact, that if we were to allow these pleas, which seek to put the defence on a new footing, we should go in opposition to the statute, which provides that the money shall be recoverable in a certain way; and this being a debt created by the statute, it is clear that it was never intended that such pleas should be allowed. With regard to the question, whether the money is due or not, the parties ought to litigate matters of that description among themselves; they belong to another *forum*; and if the parties oppose the proceedings of their directors, it is their duty to discuss the subject at their general meeting; and if the general meeting is so far distant as to render that course inconvenient, then in twenty-one days they may call a special meeting, by section 172, at which it may be discussed. It appears to me, however, that it never was intended that a question of that general nature should be gone into in a court of justice.

The next plea puts the matter in a more tangible shape. It alleges a deviation, and says that the money is called for to pay the expenses attending that deviation. Now what would be the effect of allowing that plea? If any deviation to the extent of three yards only be made, with the consent of the parties whose land adjoins the works, and a call be subsequently made, every person may stay his hand, may refuse to pay his call, and the whole proceeding would be broken up altogether. It is really so monstrous a proposition, and so utterly opposed to every thing contained in the statute, that it cannot for one moment be sustained.

Then as to the point that at the time of the calls being made there were not 36,000 shares in the Company, on what does this plea stand? Section 136 of the statute

enacts, "that notwithstanding anything in the several subscription deeds, or contracts relating to the said several lines, the capital of the Company hereby incorporated shall be £1,800,000, divided into 36,000 shares of £50 each." It is impossible then, that this plea should be allowed. There may not be 36,000 shares called into action, or for which subscribers have been found, but it is expressly provided, that the capital shall be of a certain amount, and that it shall be divided into 36,000 shares, which therefore exist in the Company.

It seems to me, therefore, that these pleas are rather calculated to raise difficulties, than to put forward any good ground of defence, and that they cannot be allowed.

BOSANQUET, J.—I am of the same opinion. I think that these pleas should not be pleaded, and that they are not pleadable under the act. The 148th section of the statute, gives directions as to the mode of declaring in an action brought by the Company, and then it goes on to state what must be proved at the trial, and it is provided, that having proved that due notice of the calls has been given, and that the defendant was a proprietor, they shall be entitled to recover, unless a certain thing appear. It would be useless, therefore, to put that in issue formally, the proof of which is a condition precedent to the plaintiffs obtaining a verdict.

Then is either of the other pleas pleadable? With regard to that, by which the existence of 36,000 shares is denied, the act of Parliament has actually created that number; and if any of them are unappropriated, or have been rejected by the individuals who are the subscribers, then the shares remain in the Company. Independently of this however, I am of opinion, that under the 148th section, it is not competent for the defendant when the things provided for are proved by the plaintiff, to set up this defence; and the same observation applies more strongly to the plea,

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that these calls were made for other and different purposes than those referred to in the statute. The consequence of this defence would be, that if the Company, which was established for certain purposes, should do anything illegally which cost money, persons in the situation of the defendants could set up a defence, that that expense had been incurred, and that the calls were made in order to pay it.

MAULE, J., concurred.

Rules discharged.

COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1839.

THE QUEEN

against

THE SHEFFIELD, ASHTON-UNDER-LYNE AND MANCHESTER RAILWAY COMPANY.

1839.

Nov. 26th.

IN Easter Term, Sir *F. Pollock* had obtained a rule *nisi*, calling upon the Sheffield, Ashton-under-Lyne and Manchester Railway Company to shew cause, why a writ of *certiorari* should not issue directed to the Clerk of the Peace for the county of Lancaster, to remove into this Court a certain inquisition, verdict and judgment, dated March 11th, of a jury summoned at the instance of the Company, for the purpose of inquiring, assessing, and giving a verdict for the sum of money to be paid to John Brooks and other persons therein named, for the purchase of certain lands and hereditaments in the township of Openshaw in the said county, the property of J. Brooks and others, on account of the execution of an Act of Parliament (7 Will. 4, c. xxi.) for making the said railway.

A Railway Company issued their warrant to the sheriff of a county, requiring him to summon a jury to assess damages under the compensation clause of their Act (7 Will. 4, c. xxi. s. 65); the sheriff summoned a jury accordingly. At the inquisition neither sheriff nor under-sheriff presided, but a clerk of the latter, assisted

by a barrister as assessor. Both the assessor and the clerk had been appointed by the sheriff his deputies for this purpose. The sheriff returned the verdict and judgment, (purporting to have been taken and delivered by himself) to the Clerk of the Peace, (by section 67) to be deposited amongst the records of the Quarter Sessions.

By section 220 of the act, it was provided that no proceeding had or taken in pursuance of the act should be removed by *certiorari*.

Held, that these proceedings having been correctly originated by the warrant to the sheriff, were in pursuance of the act, and therefore not removable by *certiorari*.

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It appeared from the affidavits that on the 22nd of February, 1839, the Company issued a warrant under their corporate seal to the sheriff of Lancashire, to summon a jury on the 11th of March then next, to assess the sum of money to be paid for the property, according to the directions contained in the Act. The jury were summoned for that day, and the inquisition was held, which with the verdict and judgment were returned under the hand and seal of the sheriff, as having been held before him the said sheriff, by virtue of the warrant directed to him as aforesaid.

That, at the time and place so appointed for holding the inquisition, Mr. Brooks attended by his counsel and attorney, and that W. A. Hulton, Esq., barrister-at-law, presided at the inquisition, and that the jury and witnesses were sworn by a clerk of the under-sheriff, who, as well as Mr. Hulton, had been appointed deputy sheriff for that purpose. That no oath was administered to them by any other person, and that neither the sheriff nor under-sheriff was present at the time of swearing the jury; or took any part in, or was present at or during the said proceedings, or any part of them: that the jury assessed the damages, and that judgment was then given and pronounced by the barrister for the sums so assessed; and that a true copy of the verdict and judgment was deposited with the Clerk of the Peace for the county of Lancaster, amongst the records of the Quarter Sessions of that county.

The 7 Will. 4, c. xxi. s. 65, enacts, "That for settling all differences which may arise between the Company and the several owners and occupiers of, or persons interested in, any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers thereby granted, or in any case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act cannot be made, then and in every such

case, the Company shall issue their warrant to the sheriff of the county in which the lands in question shall be situate, or in case such sheriff or his under-sheriff shall be one of the Company, or enjoy any office of trust or profit under them, or shall be in any way interested in the matter in question, then to any of the coroners of such county not interested as aforesaid, or if all the coroners shall be so interested, then to some person then living in the county and free from personal disability, who shall have filled the office of sheriff, under-sheriff or coroner in the county, and not be interested as aforesaid, (a person having more recently served either office being always preferred), and who is thereby enabled and directed to act in the premises; commanding such sheriff, under-sheriff, coroner, or other person, to impanel, summon, and return a jury, of at least eighteen sufficient and indifferent men [qualified as therein mentioned]; and the persons so to be impanelled, summoned, and returned, are thereby required to appear before the said sheriff, under-sheriff, coroner or other person, at such time and place as in such warrant shall be appointed; and out of such persons a jury of twelve men shall be drawn by the said sheriff, under-sheriff, coroner or other person, or by some person to be by them respectively appointed, and the said sheriff, under-sheriff, coroner or other person, is thereby empowered and required, on request in writing by either party, to summon before him all persons who shall be thought necessary to be examined as witnesses touching the matters in question, and such jury shall upon their oaths, (which oaths, as well as the oaths of all such persons as shall be called upon to give evidence, the said sheriff, under-sheriff, coroner or other person, is hereby empowered and required to administer), inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands. And the said sheriff, under-sheriff, coroner or other person, shall accordingly give judgment for such purchase-money,

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satisfaction, recompense, or compensation as shall be assessed by such jury, which said verdict and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes upon all corporations and persons whatsoever."

Section 67 enacts, "That the said verdicts and judgments, being first signed by the said sheriff, under-sheriff, coroner, or other person presiding at the taking of such verdict and pronouncing of such judgment respectively, shall be deposited with and kept by the Clerk of the Peace for the county or riding in which the matter in dispute shall have arisen, among the records of the Quarter Sessions for such county, and shall be deemed records to all intents and purposes."

And section 220 enacts, "That no proceeding to be had or taken in pursuance of this act, shall be quashed or vacated for want of form, or be removed by *certiorari*, or by any other writ or proceeding whatsoever, into any of His Majesty's Courts of Record at Westminster or elsewhere, any law or statute to the contrary notwithstanding."

Sir *J. Campbell*, Attorney-General, against the rule, took a preliminary objection, that this being a proceeding in pursuance of the act, the writ of *certiorari* was taken away by section 220. *Regina v. The Bristol and Exeter Railway Company* (a).

Sir *F. Pollock*, *Tomlinson*, and *Cole*, in support of the rule. The clause which takes away the *certiorari* does not extend to proceedings taken *coram non judice*, and which are consequently not in pursuance of the powers given by the statute; and in a case where there has been no jurisdiction, this Court will interfere to protect the subject. *Rex v. The Justices of the West Riding of York-*

(a) Ante, 368; S. C., 1 P. & D. 170, n.

shire (a). *Rex v. The Justices of Somersetshire* (b). If not, in a case like the present the public is without remedy, for these judgments (by section 67) become records, and if the party complaining brings an action of ejectment or trespass, the Company would produce this record, against which he could not aver, and which would act as an estoppel. It is admitted that neither the sheriff or his under-sheriff presided at this inquisition; but a deputy, who, it is contended, was incompetent. A deputy-sheriff differs from an under-sheriff, and is an officer not generally known to the law, although some statutes authorize deputy-sheriffs for replevin and certain other purposes. The deputy in this case holds certain proceedings, swears the jury and witnesses, receives the verdict and gives judgment; the sheriff adopts these proceedings, and makes his return: "I the said sheriff have caused twelve persons to be sworn to be a jury, and do in pursuance of the said act of Parliament, give judgment," &c. This return is apparently regular and becomes a record, purporting that all things have been done according to the Act, when the fact is otherwise; but the record being complete, the complainant has no mode of redress but by application to this Court, shewing that these are proceedings held *coram non judice*, but which have so far the appearance of judicial proceedings, as to induce the Court to inquire into them. [*Patteson*, J.—If the inquisition profess on the face of it to be taken by the sheriff, how can we look beyond it?] A document which is apparently regular, may be shewn to be irregular by affidavits, as in the case of *Rex v. St. James', Westminster* (c); and that there are many cases in which affidavits may be looked at, in order to ascertain whether there was jurisdiction or not, was decided in the case of *Regina v. The Justices of Cheshire* (d),

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(a) 5 T. R. 629.

(c) 2 A. & E. 241.

(b) 5 B. & C. 816; 6 D. & R. 469.

(d) 1 P. & D. 88; S. C., 8 A. & E. 398.

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where an order of sessions, valid on the face of it, was shewn to be made without jurisdiction. It is the practice in Equity not to interfere in such a case, *Simpson v. Lord Howden* (a), but it is otherwise in this Court, as it would put parties in considerable danger of being prejudiced without being heard. *Regina v. The Justices of the West Riding of Yorkshire* (b). And see *Rex v. The Justices of Derbyshire* (c), where a *certiorari* (although expressly taken away by 3 W. & M., c. 12, s. 23), was granted to remove a highway order, because, although all parties had applied to the Quarter Sessions, yet that did not give that Court jurisdiction. The decisions in *Rex v. The Justices of St. Albans* (d); *Rex v. The Justices of Cashibury* (e); *Rex v. The Justices of the West Riding of Yorkshire* (f); and *Rex v. St. James', Westminster* (g), which apparently contradict the inference drawn from the cases above cited, are all distinguishable on the ground that the proceedings in each of them were held by competent jurisdiction, and therefore this Court could not inquire into the sufficiency of the reasons which influenced those proceedings.

Sir J. Campbell, Attorney-General, Sir W. Follett, and Wightman, against the rule.—We are not called upon to point out any remedy, for no remedy was intended. The clause in question was inserted to prevent frivolous objections. [Lord Denman, C. J.—The 65th section prescribes very minutely who is to preside.] That is, the warrant is to be addressed to the Sheriff, but he may preside by deputy, as when he employs a bailiff to serve a writ, or his under-sheriff to execute a writ of inquiry. The words of the clause are “sheriff, under-sheriff, coroner or other

(a) Ante, 326; 1 Keen. 583; 3 Myl. & Cr. 97.

(b) 2 N. & P. 457; S. C., 7 A. & E. 583.

(c) 2 Ld. Ken. 299.

(d) 3 B. & C. 698; S. C., 5 D. & R. 538.

(e) 3 D. & R. 35.

(f) 1 A. & E. 563.

(g) 2 A. & E. 241.

person," and the jury is to be drawn by them or by some person appointed by them. [*Patteson*, J.—That other person is only appointed to draw the names; here the objection is to the person presiding.] Then if the writ were directed to the sheriff, the under-sheriff could not have presided. The meaning is that the warrant is to go to the sheriff, he executes it himself in contemplation of law, but in fact by any one he chooses to appoint. This case is the same in principle with *Regina v. The Bristol and Exeter Railway Company* (a). There all the authorities were cited which have been produced in this case, except *Rex v. The Justices of Derbyshire* (b), which does not differ from the others in principle, but was thought to be a case where the subject ought to be relieved. The return of the sheriff is made a record by section 67; if it be so, it must be taken to state what is true, and how can any evidence against the record be admitted, any more than in an action of trespass? The clause applies to every thing done in pursuance of the act, and it cannot be said it is not in pursuance, if it purports in the return to be so. The distinction between this and the other cases, is, that these proceedings are the creation of the act, and if it is allowable to object that the act is not complied with in every minute particular, it would open every case to *certiorari*. The Legislature thought the balance of convenience was the other way, and that was their main object in taking away the *certiorari*. This may be a defective proceeding under the act, but it is a proceeding under the act, and therefore this Court cannot inquire into it. The principle of the case of *Rex v. The Justices of Somersetshire* (c) was not, that they exceeded their jurisdiction, but that they had made an order, which order could be removed by *certiorari*. Suppose an act of Parliament creates Courts with a jurisdiction over cases of 40s., and they try causes of 5*l.*; if there were

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(a) Ante, 368; *S. C.*, 1 P. & D. 170, n.

(b) 2 Ld. Ken. 299.

(c) 5 B. & C. 816; 6 D. & R. 469.

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a clause in that act taking away *certiorari*, this Court would not interfere. As in cases which turn upon notice of action, as to justices or constables; “in pursuance of an act,” means something done under colour of the act, otherwise no inquiry could take place, for the slightest irregularity either in the course of proceeding or form of drawing it, would be said to be not in pursuance of the statute, as if the sheriff were of kin to the parties, one of the witnesses not sworn, or an improper number of jurymen drawn. The Company might have brought up an inquisition in which none of the proceedings were set out, there would be no authority to disturb it, for it is made a record of the Court of Quarter Sessions on purpose to avoid these questions.

Sir *F. Pollock*, in reply.—The argument on the other side goes to this extent, that, if an inferior Court entertains a cause of 5*l.*, and makes false returns in order to evade inquiry, although this were brought to the notice of this Court by affidavit, it could not deal with it; and that if a sheriff can be prevailed upon falsely to enter any proceeding as of record, no power of this Court can alter it; he may assert and assume all these things done, and there would be no remedy. If it were a question of jurisdiction defectively exercised, there would be no *locus standi* for the parties making this application, but the objection is that the whole proceeding from beginning to end had no foundation in law. This was a judicial and not a ministerial duty of the sheriff, and that is the distinction between this case and that of *Regina v. The Bristol and Exeter Railway Company* (a).

Lord DENMAN, C. J.—I must say I have entertained considerable doubt on this subject, and I think the argument on the part of the Company has been pressed to an alarming

(a) Ante, 368; *S. C.*, 1 P. & D. 170, n.

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extent. I hear with much surprise that, in the case of a Court appointed to try questions of 40 shillings damages, under an act of Parliament containing a clause similar to the one in question, if that Court should think fit to try a case in which £40,000 was in question, our jurisdiction would be taken away by the Judge making a false return. This Court holds jurisdiction over all inferior Courts, and where *certiorari* is taken away by an act of Parliament, it must be in the terms of that act, and for something done in pursuance of it. The fair import of *Regina v. The Bristol and Exeter Railway Company* (a), is that, where the act done is locally and visibly out of the jurisdiction, it is then the act of a stranger, and we cannot consider it any Court at all, but leave the party to their remedy by an action of trespass; as if an inquisition were held in Bedfordshire to assess the value of lands in another county; but this is something sought to be shewn to be without the jurisdiction by extrinsic evidence, and that too where there is a clause in the act which, by enacting that it shall be a record, makes the sheriff's return alone evidence (b); and therefore a wrongdoer would be protected if he could induce the sheriff to make a false return. Whether such a clause existed in the Bristol and Exeter Railway Act does not appear, but we do not disclaim the power of this Court to inquire whether means have been resorted to to evade our jurisdiction. In the present case however this inquiry is unnecessary, for here the authority was properly set in motion, and this is only a sort of interlocutory proceeding which took place under that authority. I therefore feel satisfied that in this case, the clause taking away *certiorari* prevents our entering into the inquiry.

PATTESON, J.—I entirely agree with the Lord Chief Justice, that where there is a total want of jurisdiction, and parties have proceeded in defiance, *certiorari* is not

(a) Ante, 368; S. C., 1 P. & D. 170, n.

(b) Section 67.

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taken away. In *Regina v. The Bristol and Exeter Railway Company (a)*, I thought there was a dilemma, which now I am not sure existed, because there may have been there, as there is here, a clause making the judgment *a record to all intents and purposes*. The question is—is this a proceeding under the act? If so, the *certiorari* is taken away; and I think it is a proceeding under the act, because it originated correctly. I hope it will not be taken as granted, that the sheriff was right in having this inquisition held in his absence; I give no opinion upon that point, though I do not at present see that any power is given him to appoint a deputy. In writs of trial the case is different, for the word “deputy” is expressly used in that act; here sheriff, under-sheriff, and coroner only are mentioned. This however is at most, an irregularity.

WILLIAMS, J.—I think it is too late to question how far records may be inquired into by this Court; Proceedings of Quarter Sessions are records, but you may shew that the Justices had no right to entertain the case; and if the proceeding here were one not within the act, I should pause before I said we had lost our jurisdiction. But this proceeding was properly originated by the warrant to the sheriff, and was therefore a proceeding under the act, then this at most was only an error in the form of proceeding, and therefore the clause applies.

COLERIDGE, J.—I do not question the authority of the cases cited, nor do I mean to justify all the expressions that fell from the Court in *Regina v. The Bristol and Exeter Railway Company (a)*, though I agree with the judgment in that particular case. This is a proceeding in pursuance of the act; wherever that is not the case, from necessity it must be opened by affidavits on both sides; therefore extrinsic evidence must, in some cases, be made

(a) Ante, 368; S. C., 1 P. & D. 170, n.

use of. Here was a proceeding distinctly originated within the act, and any subsequent irregularity cannot affect it. Suppose one witness had not been sworn, it would not perhaps be so material, as it would be if none of the evidence were given upon oath, but in principle the objection is the same, and the same rule applies. Again, suppose an action to be brought in respect of these proceedings, can any one doubt that it would be (by section 231) for something done in pursuance of the act, in the way those words are always interpreted. Therefore, confining ourselves to the objection here made, and the words of the 220th section, the former appears to me to be brought within the latter, and that takes away the *certiorari*.

Rule discharged with costs.

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COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1839.

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 Nov. 23rd.

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against

THE BRISTOL DOCK COMPANY.

A Company were authorized by act of Parliament, to make, complete, and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and of equal inclination at the sides with the old course or channel. They were also required to make compensation to persons interested in any houses and

IN Hilary Term, Sir *J. Campbell*, Attorney-General, had obtained a rule *nisi*, calling upon the Bristol Dock Company to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to repair and maintain the South Bank of the New course or channel of the river Avon, from Harford's bridge to Hill's bridge in the city and county of Bristol, made by the Company, under the provisions of the several acts of Parliament for the improvement of the port and harbour of Bristol.

It appeared from the affidavits,—that the Mayor, Aldermen, and Burgesses of Bristol, are now and were for many years prior to the passing of the act 43 Geo. 3, c. 140, owners of

lands, injured by means of the execution of the powers thereby granted. The Company, for the purposes of their works, purchased the entirety of certain closes, parts of which, after the undertaking was completed, they sold in lots. One of the conditions of sale was, that a strip of land lying between the lots and the new channel of the river, should be for ever left open as a public road. This road was afterwards adopted and repaired by the parish, but a portion of it having given way, in consequence of the action of the tide causing a slip in the bank, (whereby the inclination of the sides of the new channel became altered,) the owners and occupiers of houses built upon the said lots since the sale, called upon the Company to repair the bank, which they refused to do. On an application by the corporation of Bristol, who are conservators of the river, on affidavits stating these facts, and also stating apprehensions of injury to the navigation, though not shewing any actual impediment caused thereto, the Court granted a *mandamus* to compel the Company to repair and maintain the bank.

the port of Bristol, and conservators of the rivers Avon and Frome, and that by the said act, intituled "An Act for improving and rendering more commodious the port and harbour of Bristol," after reciting (amongst other things) that certain dangers and inconveniences therein mentioned, might in a considerable degree be remedied, by cutting a new course for the river Avon on the Somersetshire side of its then present course, it was enacted that certain bodies corporate and persons therein mentioned, should be a Company, to be known by and to use the firm or style of the Bristol Dock Company; and the said Dock Company were by the act authorized and required (amongst other works), to make, complete and maintain a canal or entrance basin in Rownham Mead; and also to make, complete and maintain a new course or channel for the river Avon from or near the Redcliff, through part of the parish of Bedminster in the county of Somerset, and through part of the parishes of St. Mary, Redcliff, and Temple in the city of Bristol, into the river Avon, at or near the high land called Totterdown, the same to be of equal depth and breadth at the bottom, and of equal inclination of the sides as the present river course then was in those parts thereof which had not been excavated or embanked by quay walls or other buildings, or as near as circumstances would admit, and except only in such parts of the new course as should be cut through rock or stone; and also to make, complete and maintain such other works and improvements within the limits thereafter mentioned, as the Company should consider necessary for, and which would completely answer and effect the purposes aforesaid (a).

That all the then present and intended courses of the river Avon, and the intended canals and other works should be taken and accepted as member, part and parcel of the aforesaid city of Bristol and county of the same city,

(a) Section 30.

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and of the port of Bristol, and within the jurisdiction, power and authority of the Mayor, Burgesses, and Commonalty of the said city (a); and that the ownership of the port of Bristol and the conservatorship of the new course of the river Avon, and the several works to be made in pursuance of the act, should be vested in the Mayor, Burgesses, and Commonalty of the said city, in as full and ample a manner in every respect whatever, as the ownership of the said port and conservatorship of the rivers Avon, Frome and Severn within the said port, was or were vested in the said Mayor, Burgesses and Commonalty, before the passing of the said act (b). That the houses, buildings, lands, tenements and hereditaments to be purchased by virtue of the act, and all buildings, erections, and other matters and things thereon or thereunto belonging, and also all docks and canals which should be made in pursuance of the act, should be and the same were thereby vested in the Company and their successors, until the capital raised on security of the rates and duties therein mentioned should be paid off and discharged, and afterwards should be vested in the Mayor, Burgesses and Commonalty of the city of Bristol, as owners of the port of Bristol and conservators of the rivers within the said city and port of Bristol (c).

That on the 10th of May, 1837, a memorial was presented to the town council of Bristol, signed by twenty-five owners and occupiers of dwelling-houses and other property along the south bank of the new course, stating that the whole line of the bank had given and was then constantly giving way, from the continued run of the river setting in on the south side; that in some places the bank had given way to such an extent, as to have carried with it from ten to fifteen feet of the public road, and that if means were not taken to repair and sustain the bank, the road would be altogether destroyed, and the approach to the

(a) Section 65.

(b) Section 133.

(c) Section 72.

houses taken away. That a copy of this memorial was transmitted by the town council to the Dock Company, accompanied by a notice requiring them to do what was necessary to repair the evil complained of, to which notice the Company replied, that it was not their intention to take any measures for the support of such bank.

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That the south side of the new course is not of the same inclination as when it was first formed, but a portion of it for the space of about five hundred yards has given way, and either fallen into the river or accumulated at the side of it, and by such alteration in the inclination of such bank the action of the water has caused part of the ground lying between the edge of the bank and certain buildings, consisting of upwards of thirty houses, to give way also; that such ground was originally about forty feet deep, and a public roadway and footpath, next the side of the river, were many years since laid out thereon, and were then used by the public, but the greater part of the footpath, and also portions of the road, have fallen away, and thereby the space between the bank and buildings aforesaid was narrowed in several places to about twenty-four feet, thereby rendering the passage along the road extremely dangerous. That the bank was in a very insecure state, and, unless it should be effectually secured, the space of ground between the bank and the buildings aforesaid, and also such houses, were in danger of being precipitated into the river, and that thereby the navigation of such river would be greatly obstructed and impeded by the deposit of stones and other heavy matter from the bank.

The affidavits filed in answer, stated that the Dock Company were authorized by their act (a), to purchase certain lands and tenements in and about the new course of the river, and from time to time either absolutely to sell or dispose of all, or such parts thereof as might not be

(a) Sections 41 and 63.

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necessary to be retained for the purposes of the act, to such persons as should be willing to treat for the same, in such manner and upon such terms, and for such considerations, as the directors should think most advantageous for the interest of the Company. And the Company were by the act (a) required either to purchase or to make just and liberal compensation to the owners and persons interested in any houses and lands rendered useless, injured, or made less valuable, at the option of such owners or other persons, for the injury, loss, or damage suffered or sustained by reason or by means of the said works and improvements, or in case at any time or times thereafter any person or persons should sustain any damage in his, her, or their lands, tenements, hereditaments, or property, by reason or means of the execution of any of the powers thereby given, or through or by means not thereby provided for.

That the several works by the said act, and by several subsequent acts for altering and amending the same, authorized, were made and completed before the 1st of May, 1809, and the works vested in the Dock Company. That in treating for the land required for the formation of the new course, it was necessary to purchase the entirety of several closes of land through which it is formed, and, after the completion of the new course, several pieces of land, being parts of the said closes, remained in the hands of the Dock Company, not having been required for the purposes of their undertaking. That such pieces of land were in April, 1811, put up in lots for sale by auction, and sold to certain persons in the affidavits mentioned, upon this, amongst other conditions,—that a certain strip of land lying between the several lots and the river, should be by the vendors for ever left open as a public way. That in September, 1813, after the incroachment of the river on the south bank thereof had actually commenced in front

(a) Section 107.

of the lots 20 and 21, the land comprised in lot 22 was sold by the Company to Messrs. Hellicar, upon the same condition; and since the date of such sales, certain houses, being the buildings before mentioned, had been erected by the purchasers of the several lots upon the lands comprised therein, along the margin of the strip of land in front of the lots, and the same have in many instances incroached on the road. That a carriage road and footpath were many years since laid out upon the strip of land, and the road has within the last four years been taken to by the parish of Bedminster, in which the same is situate, and repaired by the highway surveyors of that parish, and before that by the owners or occupiers of the houses and lands adjoining to it.

That since the completion of the new course, the channel thereof has been somewhat enlarged by the gradual washing away of the soil at the base of the south bank thereof, which has occasioned the falling in from time to time of portions of the said footpath and road; and in the year 1817, a slip having taken place in the bank opposite to the piece of land comprised in lot 19, the purchaser of that lot applied to the Dock Company to repair the bank; and on their refusing to do so, he himself took measures for securing the bank against the river. That this determination of the Dock Company not to repair was acquiesced in for many years by the owners and occupiers of the land and houses on the south bank, but that within the last few years applications have been made to the Company by the said owners and occupiers, and also by the corporation of Bristol at the instance of such owners and occupiers, to repair the bank, in order to preserve the road from injury, with which applications the Dock Company have declined to comply.

That although in consequence of such slips, the inclination of the bank is not now the same as when it was first formed, yet the dimensions of the new course have been

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thereby increased, and are of greater capacity than when completed in 1809; and the new course is throughout of equal, and in general of greater capacity than the old river was.

That one cause of the slips having taken place, is the improper construction of a sewer from the houses to the river, which discharges itself near the top of the south bank, and wears away the sides thereof, and the road having been allowed to remain for many years in a very imperfect state of repair, and no means taken to carry off the water from the surface thereof, the surface water has been permitted for some years past to escape from the road down the sides of the bank in a great number of places, and has tended to waste the side of the bank, and to occasion the mischief complained of to the road.

That no complaint has ever been made, either by the corporation of Bristol or by any other persons, of any injury having been occasioned to the navigation by the slips in the bank, nor has the channel been at all obstructed, or the navigation in any way impeded thereby; and the washing away of the bank, if continued, would not cause any obstruction which might not easily be removed, and the same would be immediately removed by the Dock Company. That there is no present danger whatever to be apprehended for the safety of the houses; and if the road were properly repaired and kept in order, and the sewers and land water properly carried off, and other proper and ordinary precautions, usually adopted by parties erecting houses and buildings on the sides of navigable rivers, subject to the flux and reflux of the tide, for the purpose of protecting and supporting the same, taken by the owners of the houses, there would be no reasonable ground to apprehend that the action of the tide upon the bank would at any future time cause the houses to fall into the river or affect their safety. That the slips which had already taken place had been rather beneficial than

otherwise to the navigation of the river; and the continued wasting away of the south bank would, instead of impeding or obstructing, rather tend, by increasing the dimensions of the new course, to afford additional accommodation to the parties using the navigation thereof.

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Sir *F. Pollock*, and *Davison*, now shewed cause (*a*). The Bristol Dock Company have by their original and various subsequent acts, powers to do certain things necessary for the improvement of the port of Bristol, and amongst others to shut up that portion of the river Avon which passes through Bristol, and to make an artificial canal connecting the upper point of the river where it enters the city, with the lower where it leaves it, leaving the natural channel to be formed into a dock. Under the statute 43 Geo. 3, c. 140, s. 30, the power is given to make this channel, and the question in this case turns upon the words of that section. The Company made the canal in perfect compliance with the act, but inasmuch as a new channel was to come in the place of the old, and the tide was to flow there, being excluded from its natural course, it was impossible not to anticipate that a change in the identity of the new channel would take place, on account of the flux and reflux of the tide, and the freshes continually coming down. The consequence has been, that the sides of the canal have been washed away, and are not now of the same slope as they were originally; no one says the depth, width, and slopes are not equal to what they before were, or that there is not as large a flow of water without the slightest obstruction; but the complaint is that the river is not kept in the same identical channel, that is, that the new channel is not now a *fac-simile* of the old one. The Dock Company contend that the act of Parliament never contemplated such a duty as is now sought to be imposed upon them; they admit that unless the new slopes were

(*a*) Before Lord *Denman*, C. J., *Patteson* and *Williams*, Js.

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originally made equal to the old, there would not be such a section of channel as would afford a facility of carrying away so great a body of water as before; but that is no reason why the slopes should not be greater. It might with equal reason be contended, that if the natural flow of fresh water in conjunction with the tide were to deepen the channel, it would be incumbent on the Company to fill up the vacuum thus caused. As far as the liability of the Company extends, it is a very important question, what is the meaning of "a making and maintaining a new channel." The Company contend that it only means a water way as ample as the old channel, without imposing any liability as to the banks, unless the slopes are not equal to, that is, of the same inclination, as the former. And even supposing this conclusion as to the construction of the act to be wrong, is it a ground of *mandamus*? The case of *Rex v. The Severn and Wye Railway Company* (a), goes to an extreme length, and see *Regina v. Gamble* (b). The duty of the Company as regards the public is satisfied by making and maintaining the new channel; and although this rule is moved for by the corporation, the conservators of the river, they have shewn no cause of complaint, but, as a convenient mode of obtaining an opinion on this question, have lent themselves to an application on behalf of the owners of the houses on the bank, who are said to be apprehensive of injury. The answer to the latter parties is, that sections 107 and 108 authorize the summoning of a jury to assess damages. [*Patteson, J.*—Is it quite clear the compensation clause would apply?] The words of the 107th section are, "any injury received from or by means of such works," and "in case at any time or times hereafter, any person or persons shall sustain damage in lands, tenements, hereditaments, or property;" the clause therefore distinctly gives compensation to any person whose

(a) 2 B. & A. 646.

(b) Decided this Term, not yet reported.

lands may be affected by anything injurious arising thereafter. Compensation in damages is the proper remedy, unless some great public duty created by the act be violated, as by stopping the channel or delaying the navigation. The affidavits state not that the navigation *is*, but *will be* impeded; and that the road on the bank *will be* injured; if so, the Dock Company will be liable to indictment.

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These house proprietors are not original owners, but have, since the works were completed, purchased the land of the Company upon certain conditions. The history of the transaction puts them on a very different footing from the public at large: they ought to have secured the benefit claimed by contract at the time they purchased, and, having acquired this property by purchase, they cannot put the clause intended for public purposes in force for their private advantage. In the case of damage from high tides, or from the channel becoming deeper, the expense of restoring would be immense compared with that of making compensation; and it would be unjust to call upon the Company to undertake the former.

Sir *J. Campbell*, Attorney-General, Sir *W. Follett*, and *Butt*, *contrà*, were stopped by the Court.

LORD DENMAN, C. J.—We think a *mandamus* ought to go.

Rule absolute.

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November
25th, 26th.

Between JOHN WARBURTON, THOMAS POYN-
DER, WILLIAM ROBINSON, WILLIAM
HINE, AND JOHN EARLY COOK, - Plaintiffs,
and
THE LONDON AND BLACKWALL RAILWAY
COMPANY, - - - - - Defendants.

A Railway Company in the course of their works caused excavations to be made in their own land, within three feet of the walls of houses belonging to the plaintiffs, and to a depth of fifteen feet lower than the foundations of such houses.
On affidavits that the houses had been undermined and were in danger of falling in, and that the lives of the occupants would not be in safety if the excavation was allowed to proceed, the plaintiffs obtained an injunction ex parte, restraining the Company from making further excavations.

THE bill stated the will of J. E. Cook deceased, whereby he devised certain houses, being Nos. 6 and 7 in Worley Court, and Nos. 6 and 7 in Crown and Shears Court, Minories, in the parish of St. Botolph without Aldgate, in the city of London, to the plaintiffs Warburton, Poynder, Robinson, and Hine, upon certain trusts for the benefit of the plaintiff Cook. [The bill then stated the act, 6 & 7 Will. 4, c. 123, incorporating the Commercial Railway Company (a), ante, p. 276]. That the line of the railway passes near the said houses. That in October, 1839, under colour of the provisions of their act, and for the alleged purposes of the railway, the Company, without the knowledge or consent of the plaintiffs, commenced excavating the ground near the said houses. That after such excavations had been commenced, and on the 7th of October, Mr. W. Tite, the surveyor of the Company, called on but did not see the plaintiff Hine, who has the management of the property on the subject of the works; that Hine, being informed of the object of Mr. Tite's visit, found upon

(a) By a subsequent act, 3 Vict. c. 95, s. 2, it is enacted that the Commercial Railway Company shall thenceforth be called and known by the name of "The London and Blackwall Railway Company."

On affidavits on the part of the Company, stating that the excavation had not endangered, and, if proceeded with in the ordinary manner, would not endanger the houses; and that the giving way of the houses was owing to the wall thereof being very old and badly built, and to the taking down of an adjoining building, the Court dissolved the injunction with costs.

inquiry that the Company had already, without the knowledge of or permission from the other plaintiffs, entered upon the premises, and had caused the house No. 6, Worley Court, to be shored up. That Hine immediately, and on the 7th of October, sent a letter to Mr. Tite, thereby stating that a Mr. Perry was the surveyor of the estate; that with regard to granting the Company permission to go upon the premises to shore them up, he found that they had done so without authority; that so far as the safety of the tenants was concerned, he was not sorry to hear of that fact; that Mr. Perry was fully authorized to treat with Mr. Tite and to fix the value of the property. That the Company are by the act empowered to purchase the houses, and the plaintiffs believed that they would have communicated with Mr. Perry before they proceeded further with their works, but they had not done so. That some of the tenants and occupiers of the houses, having become alarmed at the works and excavations, applied to the plaintiffs on the subject. That on the 12th of October, the plaintiff Hine wrote to Mr. Tite, stating the complaints of the tenants, and requesting that Mr. Perry might be consulted before any further steps were taken. That on the 15th of October Mr. Perry visited the works, and found that the excavations had been proceeded with, and that the carrying on thereof must be attended with imminent danger to the houses, and he immediately gave the clerk of the works express and distinct notice to discontinue the excavations; that, in consequence of such notice, the works near the houses were discontinued until the 8th of November, when the same were recommenced, and although the plaintiffs through their agents have repeatedly warned the Company of the impropriety of their proceedings, and of the danger occasioned to the houses thereby, the Company have continued to proceed, and are now proceeding therewith, and the excavation extends the whole length of the houses, and is within three feet of the walls thereof,

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and is in depth from twelve to fifteen feet below the foundations of the houses, and from twenty to twenty-five feet below the surface of the ground, and the houses and premises are in fact undermined. That the plaintiffs have been informed that on the 13th of November, several tons of earth adjoining closely to the house No. 7, Worley Court, gave way and fell in, and by reason of the excavation the houses are in great danger of falling in, and the lives of the tenants or occupiers thereof are in great danger. That the houses will not be in a safe state, nor the lives of the tenants be safe, whilst the excavation remains in the present state. The bill charged that the Company have not made any offer to purchase or to treat for the houses and premises, or any or either of them. The bill prayed that the Company, their servants, agents, and workmen, may be restrained from proceeding with the excavation and works, so as aforesaid commenced by them along, or by the side, or at the end of the houses and premises in Worley Court and Crown and Shears Court aforesaid; and from commencing or proceeding with any new or other excavation or work, or doing or causing to be done any act, matter, or thing whatsoever, either under colour of the provisions of the act or otherwise, which shall endanger or in any way injure the said houses and premises, or any or either of them, or any part thereof, or the property or lives of any of the tenants or occupiers thereof, or of any or either of them; and from doing or occasioning any other waste, spoil, or destruction to the said houses and premises, or any or either of them, or any part thereof; and to the property of any of the tenants or occupiers thereof, or of any or either of them or any part thereof; and may likewise be restrained from permitting the houses and premises, or any or either of them, or any part thereof, to remain in a dangerous or unsafe state or condition, or in any other state than that in which the same were before the Company commenced their works; and that the Company may be

decreed to pay the costs of the suit. And for further relief.

Upon affidavits verifying the statements contained in the bill, the plaintiffs obtained an injunction *ex parte*, restraining the Company in the terms of the prayer of the bill from making further excavations.

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The Company gave notice of a motion to dissolve the injunction. In support of the motion the affidavits stated, that the cause of the house No. 6, Worley Court, giving way, was partly owing to the wall thereof being very old and badly built, and partly to the adjoining house having been pulled down, and was in no degree occasioned by the excavations. That the Company had proposed to shore up the houses at their own expense, and to make good any injury, and to pay any loss, that the plaintiffs might sustain by the works; that the plaintiffs had refused to allow of the shoring; that a space has been left of sufficient width to insure the safety of the houses; that the earth which has slipped has fallen in a shelving direction principally from the surface, and the width at the bottom of the excavation remaining undisturbed, and the width at the level of the foundations of the houses being at the narrowest part five feet, and measures having been taken, by placing shores along the side of the excavation, to prevent any further slip of the earth, no danger is to be apprehended to the houses from the excavation. That if the excavations should remain for any length of time in their present state, during rainy or frosty weather, danger would be occasioned to the houses. Mr. Cubitt, an eminent builder, and two other builders, deposed that the foundation of none of the houses had given way, and that they were decidedly of opinion that the excavation, as at present made, had not endangered the foundations; and they were also of opinion that, by using the means which are ordinarily adopted in such cases, the works might be completed

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without injury to the houses, provided the Company should be permitted to carry on the same without delay.

The 51st section of the 6 & 7 Will. 4, c. 123, enacts that in case any dwelling-house or shop in the parish of St. Botolph, without Aldgate, which shall be situated within fifty feet from the railway shall be deteriorated in value, and the owner or owners thereof shall, by notice in writing, require the Company to purchase the same, it shall be lawful for the Company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of the dwelling-houses or shops mentioned in such notice, and for the compensation, recompense, or satisfaction to be made for any loss, damage, or injury in respect of any good-will, tenants' fixtures, improvements, or otherwise, occasioned by the taking thereof. [The clause then detailed the necessary measures for the completion of such purchase or purchases].

Mr. *Jacob*, and Mr. *Bigg*, in support of the motion to dissolve the injunction.

The Company are entitled to every use of their own land, but they must not exercise it in a negligent or incautious manner; they may excavate up to their own boundary, provided they give sufficient notice to their neighbour to take the necessary precautions for the preservation of his adjoining property. *Peyton v. The Mayor and Commonalty of the City of London* (a). *Wyatt v. Harrison* (b), *Walters v. Pfiel* (c), *Jones v. Bird* (d).

It is true that in *Partridge v. Scott* (e), the proprietor of an ancient house was held entitled to have it supported by land belonging to the coterminous land owner; but

(a) 3 Carr. & P. 363; 9 B. & Cress. 725; 4 Mann. & Ryl. 625. (d) 5 P. & Ald. 837; 1 Dowl. & Ryl. 497.

(b) 3 P. & Adol. 871.

(e) 3 M. & W. 220.

(c) 1 Mood. & Malk. 362.

that case rests on its own peculiar circumstances; there a house was situate in a mineral district, and the land immediately beneath it having been excavated, the natural foundation had been withdrawn. The house was consequently supported on an arch, which rested on coterminous land belonging to another party, and had been so supported for upwards of twenty years, whereby the proprietor had acquired a *quasi* easement in the adjoining soil. In this case there is no allegation of title to sustain a claim of that nature.

The Company differ from ordinary land owners: they have parliamentary powers, which, even assuming the easement or right now claimed to be substantiated, would authorize them to interfere with it.

By the 51st section of the act, the Company are compulsorily liable to purchase any house which shall be deteriorated by the railway works.

The fact of the offer on the part of the Company to shore up these houses,—a measure which they are not legally bound to undertake,—having been suppressed at the time of obtaining the injunction, the Court will now dissolve it.

Mr. Knight Bruce, and Mr. G. L. Russell, contra.

If for upwards of twenty years a party has made use of his neighbour's land in a manner not concealed, he thereby acquires a right or an easement. The right now claimed is analogous to the more familiar cases of the acquired user of light and water: if a party builds a house on the extreme confine of his own land, and opens a window which overhangs his neighbour's land, that neighbour may block it up; but if he permits the encroachment to remain undisturbed for a certain period, he is debarred from disputing its continuance. The same rule prevails as to the acquired use of a stream of water, and to easements of a similar nature. With regard to the injury

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now sought to be remedied, the rule is thus laid down in Rolle (*a*): “If a man dig a pit in his land so near that my land falls into the pit, an action on the case lies.” So in Viner’s Abridgment (*b*), A. was seised of a house newly built, and B. was seised of a house next adjoining, and B. dug a cellar so near the house of A. that he undermined it, by reason whereof part of A.’s house fell into the hole so dug; action on the case lies for A.: *Roberts v. Read* (*c*), *Partridge v. Scott* (*d*). It is objected that on the face of this bill there is not sufficient allegation of title to sustain the right or easement claimed. One tenant however swears, and the fact is uncontradicted, that he has occupied one of these houses for twenty-nine years. If any other evidence of the antiquity of these buildings is requisite, the Court will give leave to supply it; this is a case of immediate apprehended mischief, in which strict legal pleadings may be dispensed with.

Mr. Jacob, in reply.

It is assumed that a period of twenty years confers a mutual alternative right of support to all contiguous buildings, but that question has never been decided. All the cases have invariably turned on negligence or no negligence. An easement of the nature claimed by this bill originates in a supposed grant. Such presumption may naturally arise in a case where one person has for a certain period been in the habit of walking over another’s land, or enjoying the stream of light flowing through the column of vacant air immediately above the land of another person; but no presumption arises in the case of a house or other building, which, on the principle of gravitation, must be taken to be supported by its own particular sub-existing foundation. A right of this nature lying in grant must be alleged by the bill, there being cases in which

(*a*) 2 Roll. R. 565.

(*b*) Tit. actions, case, n. c.

(*c*) 16 East, 215.

(*d*) 3 M. & W. 220.

a grant cannot be presumed: for example,—as against a landlord where the property has been enjoyed under a lease, or in the case of a church lease. The Court is asked to supply all the legal requisites to a claim of this nature, in order that the plaintiffs may sustain an *ex parte* injunction.

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The VICE-CHANCELLOR.—I shall look into the affidavits before I give judgment: as I understand the case, if the works remain in their present condition, and the weather should be wet, in all probability the danger which the plaintiffs apprehend will be realized; whereas, if the Company are permitted to proceed, they will merely finish the wall they have begun, and will then ram in earth in a manner which will tend to the security of the plaintiffs' houses. I understand that the excavations have been carried to the utmost depth which the Company propose. I think that the works ought to be allowed to proceed to the extent I have mentioned, without prejudice to the question of right which I have to determine.

The VICE-CHANCELLOR.—This was an application to dissolve an injunction, which I purposely desired might stand over before I gave judgment, in order that, in the first place, I might see how the case really stood on the bill and affidavits, and that I might have the advantage of learning by the test of time something about the truth of the case. It was represented by the plaintiffs to be a case of imminent danger. Now, on reading the bill, I do not find that there is any special statement tending to shew that the plaintiffs have any particular right of easement in that which is unquestionably the defendant's land, nor do I understand that in any way the Company are represented to have done, or in fact have done, anything which by law they might not do. They are making these excavations on their own land, and for a purpose and in a

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manner authorized by their act of Parliament; and they have taken down an end house—which is not an act now complained of—in pursuance of their lawful right. I observe that the bill states that they have undermined the plaintiffs' houses, and there is an expression to the same effect in one of the letters of the plaintiffs, but no affidavit states that such is the fact; there is some difference of opinion on the subject, but I am able to form some general notion of what has really happened, which is, that the wall of one of the houses has bulged. The plaintiffs try to attribute this to the excavation which the defendants have made; but one affidavit on the part of the defendants states that the wall is weak and badly built, and the houses old. With respect to these three circumstances, there is no denial by the plaintiffs, and to a certain extent there is an admission that the houses are old; for, for the purpose of supporting a charge, which has really nothing to do with the case, that the houses were occupied by weekly tenants, there is a sort of laboured exposition of the duration of the tenancy with respect to some of the houses, and it is stated that one family has occupied one of them for twenty-nine years. There is no denial that the wall which has bulged was weak and badly built, and looking at the affidavits of the engineer and sub-engineer, and at three affidavits made by persons perfectly disinterested, and competent to judge on the subject, namely, Mr. Cubitt and the two other builders, I cannot but think that the plaintiffs were alarmed unnecessarily. I give credit to the person who was the tenant, who states that he was so fearful for himself, his family, and his lodgers, that he withdrew himself and family, and induced his lodgers to do so also; but it does not follow that his fears were reasonable, or that he attributed them to a right cause. The bill was filed on a misapprehension of the real fact, and upon the question of fact,—there being no question of law, my opinion is that the injunction should be dissolved with costs.

Between ABRAHAM J. MOUCHET, JOHN RICH,
and WILLIAM LICHFIELD, - - - Plaintiffs,
and

1838.
Jan. 18th.

THE GREAT WESTERN RAILWAY COMPANY, Defendants.

THE bill stated, that the two first-named plaintiffs are devisees and trustees and executors under the will of W. Lichfield, deceased, and the other plaintiff is the cestui que trust under the same will. That ever since the death of the testator W. Lichfield, in the year 1813, the plaintiffs have been in the possession of a certain copyhold estate, whereof the testator was seised, to him and his heirs, according to the custom of the manor of Hanwell, in the county of Middlesex, which estate consists of a dwelling-house, offices, outbuildings, garden, orchard, and land, and particularly of a plot of land belonging thereto, and the whole comprising about ten acres of statute measure. That a part of such land, to the extent of about two acres, was set apart and used as and for a yard and orchard and garden immediately behind the dwelling-house, and the residue thereof, to the extent of about eight acres, had been bought at different times and added to the estate for the convenience of the occupiers, and was intended to be set apart and used as a paddock to the dwelling-house. That in 1831, the plaintiff W. Lichfield, from long enjoyment of the said copyhold estate, was regarded as the sole person entitled to demise the same, and considered as legal owner thereof; and one J. Littlewood, deceased, being anxious to obtain a lease of the copyhold estate, applied to

A Railway Company, under the powers of their act, purchased a subsisting lease in lands, and they gave a notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee-simple and inheritance thereof. The plaintiff filed his bill, insisting, that the Company were not authorized by their act to take more than a certain portion of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion.

Held, by the Vice-Chancellor, that, inasmuch as the contemplated proceedings would, if the Company were

not authorized by their act to take the land in question, be a nullity, and inasmuch as the entry and possession of the plaintiffs as derivative lessees were lawful, and no case was made of any sudden grievous injury done to the inheritance, the motion for the injunction must be refused with costs.

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the plaintiff W. Lichfield, to grant him such lease, without requiring the concurrence of the other plaintiffs. That thereupon an agreement was made between the plaintiff W. Lichfield and J. Littlewood, and a memorandum of such agreement was duly made and executed by J. Littlewood, dated the 2nd of March, 1831, as follows:—W. Lichfield, in consideration of the costs and expenses J. Littlewood will be at in repairing the messuage and other premises, doth for himself, his heirs and assigns, hereby agree with J. Littlewood, that he, his heirs or assigns, will, as soon as the premises shall be well and sufficiently repaired as hereinafter mentioned, grant and demise unto J. Littlewood, his executors, administrators, and assigns, by a good and sufficient lease in the law, All &c., [parcels], for the term of twenty-one years, to commence from the 25th day of March instant, determinable at the end of the first seven or fourteen years, at the option of the said J. Littlewood, his executors, administrators, or assigns, at the yearly rent of 45*l.*, clear of all taxes, in which indenture shall be contained, on the part of J. Littlewood, as well covenants for the payment of the yearly rent, as of the land-tax and all other taxes; and also for keeping the messuage, cottage, and outbuildings and fences thereto belonging, in good and sufficient repair; and also for the due cultivation of the meadow land, and the preservation of all the fences, and against converting the same, or any part thereof, into arable land; and also all such other covenants as are necessary and customary in leases of property of the like character, and for delivering up all the premises in good repair and condition at the end or sooner determination of the term of twenty-one years: and J. Littlewood doth for himself, his heirs, executors, administrators, and assigns, agree forthwith to put the messuage and all the outbuildings thereto, and also the cottage adjoining, and all the fences, into good and substantial

repair; and shall and will forthwith erect a three-stall stable and chaise-house in lieu and stead of the barn now standing on part of the premises, to the satisfaction of W. Lichfield, his heirs or assigns. That the plaintiff W. Lichfield has never granted any lease to J. Littlewood, because he never built the stable he was bound to build under the agreement; but, immediately after signing the agreement, J. Littlewood entered into possession of the messuage and premises, and repaired the messuage at a very considerable expense, as he alleged, in 1831, and laid out the ten acres of ground in such manner as he thought convenient for the use and occupation of any tenant thereof. That J. Littlewood let the messuage and land upon an improved rent from year to year, upon certain terms unknown to the plaintiffs, to one Chandler, now deceased, who, as under-tenant, took possession thereof. That J. Littlewood retained his interest under the memorandum of agreement up to the time of his death, in December, 1835. [The bill then stated the death of J. Littlewood, and that E. Patteson had become his legal personal representative.]

That, in the year 1834, certain persons became desirous of making a railway from Bristol to join another railway, called the London and Birmingham Railway; and they marked out a line, which passed through other property belonging to the plaintiffs, situate about a mile distant from the said copyhold property, and applied to the agent of the plaintiffs in respect of that property, and were told that the plaintiffs would neither oppose nor consent. That the intended line of the railway was afterwards changed, so as to pass nearer to and through the copyhold property; but no notice was given to the plaintiffs or their agent of such change. That J. Littlewood duly paid his rent to the plaintiffs, and, as they believe, received such rent for the copyhold property from Chandler; but whether J. Littlewood and Chandler ever received any notice of the change of line, and the purpose to apply to Parliament in respect

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thereof, the plaintiffs have not been able to learn : but they, at the time, believed that the lessee and occupier of the copyhold estate would take the proper course for protecting the same, when they found them to lie in the line of the intended railway.

[The bill then stated the Great Western Railway Act, (*ante*, p. 1), and the following clauses or sections thereof] :— Section 5, empowering the Company to make the railway upon, across, under, or over the lands delineated on the plan, and described in the book of reference deposited with the several Clerks of the Peace as therein mentioned. Section 6, enacting that copies of such plan and book, verified as therein mentioned, should be good evidence in all courts of law. Section 22, enacting that, on the expiration of one calendar month next after notice in writing of the intention of the Company to take lands for the purposes of the act, the owner thereof should deliver to the Company a statement in writing of the particulars of his interest therein, and of the sum of money which he was willing to receive for the value thereof, and for any damages. Section 23, empowering owners and occupiers of lands, through which the works by the act authorized should be made, to receive compensation for damage done to such lands by the execution of the railway works. Section 24, providing for the impanelling of juries to assess the value of any lands, to be taken under the powers of the act, or damage, or compensation thereto, in case of disputes between the owners or occupiers thereof and the Company. Section 42, enacting that, upon payment or tender of the monies awarded by a jury for the value of any such lands, or as compensation for any injury thereto, the said lands, and the fee-simple and inheritance thereof, should thenceforth be vested in and become the sole property of the Company to and for the purposes of the act, and that such payment or tender should operate to merge all outstanding or other terms of years, and to bar and

destroy all estates tail and other estates in reversion and remainder. Section 45, enacting that the lands to be taken for the line of the railway should not exceed twenty-two yards in breadth, except in those places where a greater breadth should be judged necessary (among other things specified) for raising embankments.

[The bill then stated the act for altering the line of the Great Western Railway, and to amend the act relating thereto, but that such second act did not vary the first act in the matters therein mentioned.]

That a notice was served upon the plaintiff W. Lichfield, dated the 2nd of September, 1836, addressed to him and Chandler, signed by Mr. B. Shaw, one of the directors of the Company.

[The bill then set forth the notice verbatim, stating the intention of the Company to take the piece of land, numbered 36 on the Parliamentary map, belonging, or reputed to belong, to the plaintiff W. Lichfield, or Chandler, or one of them, and the intention of the Company to contract for the purchase thereof, and for all subsisting leases, terms, estates, and interests therein; and further requiring them, on or before one calendar month after the notice, to deliver a statement in writing of the interest they claimed in the property, and of the amount of the money they were willing to receive in satisfaction and compensation for the value of such estate, share, interest, or charge, and for injury or damage respectively.] That the notice was served upon the plaintiff W. Lichfield, by Messrs. Swain, Stevens, & Co., as solicitors for the Company. That, upon service of the notice, the plaintiffs discovered, that there was entered on the plan and books the principal part of the grounds belonging to the copyhold estate, under the name of a meadow, in the column of numbers marked 36; in the column of owner or reputed owner, the name, W. Lichfield; and in the column of occupier, J. Littlewood; but the column for the name of the lessee was left in blank.

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That, Chandler having died, D. Fazan became occupier of the copyhold estate as under-tenant in his place. That a Mr. Turner, whose lands adjoin the copyhold estate, became desirous of purchasing the north end of the meadow, and applied to the Company, in respect of the purchase of such part thereof as was cut off to the north by the line of the railway, containing about 3a. 1r. 22p.

That some delay was occasioned by various circumstances, and a correspondence ensued between Messrs. Swain, Stevens, & Co., and Mr. James Taylor, the solicitor of the plaintiffs. [The bill then set out a letter from the solicitors for the Company, requesting that W. Lichfield's claim in respect of the property might be sent to them, and requesting leave to enter on the property, on deposit of the amount of the claim.]

That such claim was sent in the month of December, 1836. [The bill set forth a copy of such claim, which, after stating the nature of the plaintiffs' interest and the other particulars, claimed 100l. for the land required to be taken, and 400l. for general depreciation, and the Company to erect a suitable bridge of communication, and fencing.]

That, after such claim was sent, and in the month of January, 1837, the Company took possession of a plot of ground, containing 1r. 36p., without any previous notice to or consent by the plaintiffs, and without any deposit of the sum of 500l.; and they raised on such plot the embankment necessary for the railway, to the height of nine feet, and laid down a tram-road, before giving any notice of their having taken possession. That the railway, where it crosses the meadow, is seventy-two yards long and thirty-two yards wide.

That the Company experienced great difficulty in obtaining possession of some lands belonging to Mr. Turner; and, to obviate it, they came to an agreement with him, whereby they undertook to obtain for him the north

end of the plaintiffs' meadow cut off by the railway; and he thereupon undertook to give to the Company possession of land belonging to him, which they could not otherwise have obtained. That, in the month of March, 1837, the Company purchased from E. Patteson all the interest belonging to J. Littlewood under the agreement, having previously purchased of Fazan all his interest as under-tenant.

That, on the 10th of May, 1837, a second notice was served on the plaintiff W. Lichfield. [The notice was set forth: it required the whole of the piece of land distinguishable on the map as No. 36, and containing 3a. 3r. 38p., for the purposes of the railway. And the bill stated the correspondence which followed between Mr. J. Taylor on behalf of the plaintiffs, and Messrs. Swain, Stevens, & Co. on behalf of the Company; Mr. Taylor objecting to the Company taking more land than was authorized by the act, and the solicitors for the Company insisting, that the whole of the land was required for the purposes of the act, and adding that, from the size and nature of the ground no access could be made between the two parts of the meadow, which were severed, in compliance with the prescribed gradients of the act.]

That the plaintiffs have caused inquiries and an examination of the meadow to be made by competent persons; and the fact is, that no more ground than 1a. 34p., as originally measured and required, is necessary for the purposes of the act.

[The bill then set forth a notice served on Mr. Taylor, dated the 6th of June, 1837, for summoning a jury to assess the value of the whole of the meadow.] That such notice was subsequently withdrawn by the Company, who then intimated that they should give a fresh jury notice in a few days.

[The bill charged, that the second plot of land is not required, and cannot be taken for the purposes of the railway, according to the due construction of the act.

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The bill prayed, that the Great Western Railway Company may be restrained by the injunction of this Court from any further proceedings, under the acts of Parliament, for compelling the plaintiffs to give up to them possession of the second plot of copyhold land, and from in anywise prosecuting, before the Sheriff of Middlesex, any inquiry into the value of any such copyhold land under the circumstances aforesaid; and for further relief.]

The *Solicitor-General* and Mr. *Girdlestone* moved for an injunction in the terms of the prayer of the bill.—They contended, that the Company were proceeding to summon a jury to assess the value of a fee-simple of a portion of an entire piece of land, which they were not authorized by their act to take, in conjunction with that portion of the same piece of land which they were authorized to take. That the Company having purchased the subsisting lease of the piece of land, their possession was lawful, and therefore the remedy of the plaintiffs was in equity. That, by the 42nd section of the act, the intended proceedings of the Company would, on being completed, vest in them the fee-simple and inheritance of the land, which, on the expiration of the lease, would make it necessary for the plaintiffs to resort to expensive law proceedings to reinstate themselves in their property. That the intention of the Company was to raise embankments on the whole of the piece of land; with regard to the larger portion, this was an illegal dealing with the land as against the reversioner, and which, in any view of the case, the plaintiffs had a right to have restrained.

Jan. 18th.

The VICE-CHANCELLOR.—Supposing the plaintiffs to be right in their own view of the case, the proceedings before the jury as to the portion of the land which they say the Company are not entitled to take will be a nullity. A

jury can only assess the value of property which the act authorizes the Company to take; consequently, if the Company are not authorized to take this portion of land, the jury cannot assess any value for it. So, also, with regard to what has been said as to the operation of the 42nd section of the act; that operation, if the plaintiffs are right, can never take effect. The plaintiffs say, that the Company cannot lawfully acquire the inheritance in a portion of the land: be it so,—then the Company can only acquire the inheritance of those lands which the act authorizes them to take; and if they are not authorized to take the land, they never can, by means of any assessment by a jury, or any tender or payment, acquire the inheritance of that land. There is no question raised before me of an attempt to take a possession not founded in law: there is no doubt but that the possession of the Company is lawful; they will have, as long as their lease endures, all such rights as any other assignee of this lease would have, either at law or in equity.

With respect to restraining the Company from banking up the land in question—if the Company, when in lawful possession of the land, had attempted to use the land in a manner which might cause some sudden and grievous injury to the inheritance, then the reversioner might come to this Court for redress; but no case of this kind is made by the bill. The motion must be refused with costs.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Stevens*, appeared for the Company.

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March 20th.

May 8th.

Between WILLIAM WEBB and Others, trustees,
and JOHN PULLIEN, - - - - Plaintiffs,
and
THE MANCHESTER AND LEEDS RAILWAY COM-
PANY, - - - - Defendants.

The 94th section of the Manchester and Leeds Railway act empowers the Company to enter into and upon the lands of any person or corporation whatsoever, according to the provisions and restrictions of the act, and in or upon such lands, or in or upon lands adjoining thereto, to bore, dig, cut, embank, and remove and use any earth, stone, gravel, or sand,

THE bill stated, that, by an act of Parliament made in the 6th & 7th years of the reign of William IV., intituled "An Act for making a railway from Manchester to Leeds," it was enacted, that it should be lawful for the Company to make and maintain the railway, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated in the plans, and described in the books of reference deposited as therein mentioned. The bill then stated the following sections of the act:—the 94th, empowering the Company to enter into and upon the lands of any person or corporation (a)

(a) By the 2nd section of the act, it is enacted, that, where in the act the word "corporation" shall be used, the same shall be understood

to mean any body politic, corporate or collegiate, civil or ecclesiastical, aggregate or sole.

or any materials or things which may be dug or obtained therein, or otherwise in the execution of the powers of the act, and which may be proper or necessary for making, maintaining, repairing, or using the railway, and other works by the act authorized, or which may obstruct the making, maintaining, or using the same; and it empowers the Company, according to the provisions and restrictions of the act, to make or construct inclined or other planes, tunnels, embankments, bridges, &c.

The 96th section enacts, that the lands to be taken for the line of the railway shall not exceed twenty-two yards in breadth, except where a greater width may be required for either embankments or cuttings.

Semble, the Company have not, under these clauses, power by compulsory process to purchase land for the purpose of making an embankment upon other and lower land on a different part of the line.

A point, involving questions of practical science, being in dispute, and the affidavits being conflicting, the evidence was, at the suggestion of the Court, and with the consent of both parties, referred to an engineer for his report on the question in dispute, and the conclusion of the engineer, with respect to the facts, was adopted by, and made the ground of the order of, the Court.

A Railway Company will not be prevented by injunction from taking lands for purposes warranted by their act, on the ground that, previously to the filing of the bill, and before the necessity of taking it for such purposes was made known to the plaintiffs, the Company had endeavoured to take the same lands for other purposes not so warranted.

Ambiguous words in an act of Parliament, authorizing a public Company to take land by compulsory process, are to be construed against the Company and in favour of private property.

whatsoever, according to the provisions and restrictions of the act, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act empowered to take or use, and in or upon such lands, and in or upon any lands adjoining thereto, to bore, dig, cut, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the railway, or other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of this act; and also, for the purposes and according to the provisions and restrictions of this act, to make or construct in, under, upon, across, or over any lands, or any hills, valleys, streets, roads, railways, or tram-roads, rivers, canals, brooks, streams, or other waters, such inclined or other planes, tunnels, embankments, bridges, aqueducts, conduits, syphons, and drains, either temporary or permanent roads, ways, passages, weirs, dams, piers, arches, cuttings, and fences; and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engine-houses, and other buildings, engines, machinery, apparatus, and other works and conveniences, for the purposes of this act, as they shall think proper; and also to alter the course of any rivers, canals, brooks, streams, or watercourses, as may be necessary for constructing and maintaining tunnels, bridges, or passages, whether temporary or permanent, under or over the same; and also to divert or alter the course of any rivers or streams of water, roads, or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway, and to make drains or conduits into, through,

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or under any lands adjoining the railway, for the purposes of conveying water from or to the railway; and also from time to time to alter, repair, or discontinue the before-mentioned works or any of them, and to substitute others in their stead; and to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering or repairing, and using the railway, and the other works by this act authorized; they, the Company, doing as little damage as may be in the execution of the several powers to them hereby granted, and making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained in or by the execution of all or any of the powers thereby granted. The 96th section, enacting that the lands to be taken for the line of the railway shall not exceed twenty-two yards in breadth, except in those places where a greater breadth shall be judged necessary for carriages to wait, load, or unload, and to turn or pass each other, or for raising embankments for crossing valleys or low grounds, or in cuttings, or for the erection or establishment of any stations, warehouses, wharfs, toll-houses, machinery, erections, and buildings, and except at or near to the termination of the railway; and also except on commons, downs, or waste lands, unless with the consent of the owners and occupiers of any lands which the Company shall be desirous of appropriating for the purpose of obtaining greater space for the purposes of making the railway and the works and conveniences thereto belonging. The 117th section, enacting that if, in the execution of any of the powers of the act, any land shall be cut through and divided, so that what shall be left thereof on both sides or on either side of the railway shall be less than half an acre in quantity, and if the owner of any such land shall not have any other land adjoining to that which shall be so left on either side of the railway, then and in every such case,

if such owner shall so require, but not otherwise, the Company shall also purchase the land so left on both or on either of the sides of the railway, being less than half an acre in quantity, as aforesaid; the value thereof to be ascertained, if the parties differ about the same, in the same manner as is directed concerning any land to be taken or used for the purposes of the act; or in case such owner as aforesaid shall have any other land adjoining to that which shall be so left, he may require the Company, at the expense of such Company, to throw the same into the adjoining land of such owner, by removing the fences and levelling the sites thereof, and soiling the same in a sufficient and workmanlike manner. The 118th section, enacting that it shall be lawful for the Company, and they are empowered to contract with any person or corporation who shall be willing to sell the same, for the purchase of any lands, not exceeding in the whole sixty acres, in addition to the lands hereinbefore authorized to be taken and used, in such places as shall be deemed eligible, for the purpose of stations, or for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by this act authorized, which the Company shall judge requisite. The 120th section, enacting that, after any lands intended to be taken or used for the purposes of the act shall have been set out and ascertained, it shall be lawful to and for all corporations, tenants in tail or for life, or for any other partial or qualified estate or interest, husbands, guardians, trustees, and feoffees in trust for charitable or other purposes, committees, executors, and administrators, and all trustees and persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of all persons entitled in reversion, remainder, or expectancy, after them, if incapacitated; and for and on behalf of their cestuis que trust; and to and for all other persons whomsoever seised, possessed of, or interested in any such lands, to contract for, sell, and convey the

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same, or any part thereof, unto the Company. The 137th section, enacting that all persons and corporations by this act capacitated to sell and convey any lands, or to enfranchise lands of copyhold or customary tenure, or to release lands from rents and other incumbrances charged thereon, and the respective owners and occupiers of any lands, through or upon which the railway or other works hereby authorized are intended to be made, may agree to accept and receive, and may, subject to such restrictions as in this act are contained, as to the payment thereof, accept and receive satisfaction and recompense for the value of such lands, or of the interest therein, by them conveyed; and also compensation for any damage by them sustained by reason of the execution of any of the works by this act authorized; and also by reason of the severing or dividing such lands; and also for and on account of any other damage, loss, or inconvenience whatsoever, including tenants' right, according to the custom of the country, which may be sustained by such persons and corporations by reason of the execution of any of the powers of this act, in such gross sums as shall be agreed upon between such owners and occupiers respectively and the Company, or as shall be ascertained and settled by a jury as thereafter is directed. The 138th section, enacting that, if any person, corporation, or trustee so interested or entitled, and capacitated to sell, agree, convey, or release, shall not agree with the Company as to the amount of such purchase-money, or satisfaction, recompense, or other compensation, or if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other satisfaction, shall refuse to accept such purchase-money, satisfaction, recompense, or other compensation, or if any such parties shall, for the space of twenty-one days next after notice in writing given, (as therein mentioned), neglect or refuse to treat or shall not agree with the Company for the sale thereof:—[The remainder of the clause detailed the usual proceedings for the impanelling of

juries.] The 143rd section, enacting that, in every case in which the verdict of a jury, summoned as aforesaid, shall be given for a less sum than shall have been previously offered by the Company for the purchase of any lands to be used and taken by them for the purposes of the act, then one moiety of the costs, charges, and expenses of obtaining such verdict shall be defrayed by the party with whom the Company shall have such controversy or dispute, and the remainder thereof by the Company; and the other moiety of such costs, charges, and expenses, shall and may be deducted out of the money adjudged to be paid to such other party as so much money advanced to and for his use, and the payment or tender of the remainder of the money so adjudged shall be deemed and taken, to all intents and purposes, to be a good payment or tender in satisfaction of the whole thereof. The 150th section, providing for the payment into the Bank of England of any money which shall be agreed or awarded to be paid for the purchase of any lands, to be taken or used by virtue of the powers of the act, or for any interest therein, or for any compensation under the act which any corporation, tenant in tail or for life, trustee or feoffee in trust for or on behalf of any cestui que trust, shall be entitled unto, interested in, and thereby capacitated to convey. The 160th section, enacting that, upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury in manner aforesaid, or if the parties so respectively interested and entitled thereto shall refuse to receive such money as aforesaid, or shall refuse, neglect, or be unable, to make a good title to such lands to the satisfaction of the Company, then and in any such case, upon payment of such money into the Bank of England, as thereinbefore directed, to the credit of the parties interested in such lands, it shall be lawful for the Company immediately to enter upon such lands, and thereupon such lands, and the fee-simple and inherit-

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ance thereof, or, as the case may be, the estate, term, and interest purchased, together with the yearly profits thereof, and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the Company, to and for the purposes of this act; and such payment or tender and conveyance, or such deposit in the Bank of England as aforesaid, shall operate to merge all outstanding and other terms of years, and bar and destroy all dower, and all estates tail, and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever, of and in the said lands: Provided nevertheless, that before such payment, tender, or deposit in the Bank of England as aforesaid, it shall not be lawful for the Company, or for any person acting under their authority, to bore under, dig, or cut into, or enter upon such lands. The 161st section, enacting that it shall be lawful for the Company, their agents and workmen, to enter upon the lands of any person or corporation whatsoever, adjoining or lying near to the said railway, and other works by the act authorized to be made and maintained, or any of them or any part thereof respectively, for the purpose of laying, depositing, working, or manufacturing, upon such lands, or upon any part thereof respectively, any earth, clay, stones, bricks, slates, timber, lime, or other materials, or for forming temporary roads or approaches to and from the said works; the Company, their agents and workmen, doing as little damage as may be in the exercise of the several powers thereby granted to them, and making compensation for such temporary occupation or temporary damage of the said lands, to the owners and occupiers thereof; such compensation, in case the parties differ about the same, to be settled and recovered in manner hereinbefore provided: Provided that the Company shall, and they are hereby required, before entering upon any such lands for the purposes aforesaid, to agree with the owner or occupier of such lands for the payment by the Com-

pany of a certain and fixed annual rent in respect thereof, during the continuance of such temporary occupation (such rent, in case the parties differ in opinion thereon, to be fixed by arbitration as in the act mentioned); and also to make such compensation and satisfaction for the permanent damage or injury (if any) which may have been done to the said lands by the exercise of any of the powers and authorities aforesaid, within six months after the expiration of the period by this act granted, for executing the said railway and other works: Provided also, that, before it shall be lawful for the said Company to make such temporary use as aforesaid, they shall, and they are hereby required to give fourteen days' notice of such their intention to the owners or occupiers of such lands, and to separate and set apart, by sufficient railings or fencings, so much of the lands as shall require to be so used as aforesaid, from the other lands adjoining thereto: Provided also, that it shall not be lawful for the Company to make such temporary use of any such lands as aforesaid, lying at a greater distance than five hundred yards from the railway, nor to make bricks, or place a steam-engine upon any of such lands at any place which shall not be distant, at least, one hundred yards from any mansion, without the leave of the owner or occupier of such mansion, in writing, first obtained for that purpose: Provided also, that, before entering upon any such lands for temporary purposes as aforesaid, the Company shall, if required by the owner or occupier thereof, find two sufficient persons, who shall enter into a bond to the owner or occupier of such land, conditioned for the payment of such compensation; such securities to be approved of as in the act mentioned.

The bill then stated the title of the first-mentioned plaintiffs and others as trustees in whom the advowson or right of presentation of the vicarage of Kirkthorp and Warnfield-cum-Heath had become vested, and that the vicarage was endowed with divers lands, comprising among

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others a certain field or parcel of land in the possession or occupation of a tenant of the plaintiffs, and situate in the township of Warnfield-cum-Heath, in the West Riding of the county of York, situated in the line of the railway, and numbered 32 in the map and plans deposited as aforesaid. That the plaintiff, John Pullien, was duly appointed and inducted into the vicarage as the vicar thereof in the month of February, 1838. That in the month of October, 1837, the Company set out and appropriated for the purposes of the act a certain part of the said field, extending across it in a direction nearly parallel to the river Calder, together with certain parts of other land situated in the township, belonging to the vicarage, or held in trust for the vicar for the time being, and the part of the field set out is twenty-nine yards in width. That a jury was summoned, and the amount of the purchase-monies and compensation for damages for the said pieces of land assessed, and the amount thereof paid into the Bank of England, according to the provisions of the act. That the Company have since taken possession of the piece of ground in the field, No. 32, and have excavated and prepared the same for the railway. That, by reason of the aforesaid proceedings, the remainder of the field became severed and divided into two portions, separated from each other, and bounded by the railway, the larger of which is on the side of the railway towards the river Calder, and the smaller, containing 3r. 17p., is on the opposite side of the railway. That on the 12th June, 1838, Mr. Brackenbury, the clerk of the Company, caused to be served on the plaintiffs and on their tenant a notice of that date, stating, that the 3r. 17p. were required by the Company, and were intended to be taken and used for the purpose of the act, and requiring them to treat for the same. That on the 29th of November, 1838, Mr. Brackenbury caused to be served on the plaintiffs a notice of that date, offering the sum of 160*l.* for the purchase of the piece of land containing

3r. 17p., and giving notice that, in case the offer should not be forthwith accepted, a jury would be summoned to assess the sum of money to be paid, and the costs claimed against the plaintiffs by the Company. That on the 12th of December, 1838, Mr. C. Tennant, the plaintiffs' solicitor, wrote a letter of that date to Mr. Brackenbury, requiring to know for what purpose the piece of land was required, stating that the plaintiffs did not appear to have any power given to them by the act to sell the piece of land, and requesting any information that could satisfy them that they had power to sell; that, in reply, Mr. Brackenbury wrote a letter, dated the 14th of December, 1838, as follows:—
 “The land is wanted immediately, for the purpose of providing the Company with earth for making an embankment. Its further appropriation is not settled; if any part of it should not ultimately be required, the Company are bound to offer it to the former possessors as the owners of the adjoining lands.”

That the embankment referred to in the last letter is not intended to be made upon the piece of land, containing *3r. 17p.*, adjoining the railway; the level of the railway, where it traverses the field, being below the surface of the field, and the end of the embankment is at a distance of 146 yards from, and on the west side of the field.

That the Company have lately issued a warrant, under their common seal, to the Sheriff of the county of York, requiring him to summon a jury, according to the provisions of the act, for the 27th of December, 1838, for assessing and giving a verdict for the sum of money for the purchase of the piece of land; and, in case such verdict shall be given for a less sum than 160*l.*, they intend to demand of the plaintiffs a moiety of the expenses of summoning such jury, and to pay the amount of such purchase-money, or the remainder thereof, after deducting a moiety of the expenses, into the Bank of England; and they intend thereupon to enter upon the piece of land, in order

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that the fee-simple and inheritance thereof may become vested in them by operation of the act.

That the plaintiffs are advised that the Company are not entitled, under the act of Parliament, to require the plaintiffs to sell and convey to them the fee-simple and inheritance of and in the piece of land, for the purpose of making the embankment, but only to a temporary possession or occupation thereof, at a rent to be agreed upon between the parties, or fixed by arbitration; and that the Company are bound to make to the plaintiffs a satisfactory compensation for the injury which may be done by the Company during such temporary occupation by removing the earth and soil therefrom.

The bill prayed, that the Company may be restrained from taking by themselves, or by their clerk or other agent, any further steps or proceedings whatsoever, for the purpose of procuring a jury to be summoned and returned, to appear before the Sheriff of Yorkshire, or his undersheriff, in the town of Halifax, on Thursday, the 27th of December, 1838, or on any subsequent day, to assess and give a verdict for the sum of money to be paid for the piece of land adjoining to the railway, and containing 3r. 17p., or thereabouts, or any further steps—[The bill proceeded to pray in detail, that the Company might be restrained, so far as respected the said piece of land, from taking any other of the steps specified in the act, whereby the Company were enabled to become the purchasers and to take possession of land, until answer or further order]; and that, in case the value thereof should be assessed and possession taken, that the Company might be ordered to reconvey the said piece of land upon the trusts for which the same is now held, and may also pay to the plaintiffs all the costs, charges, and expenses incurred by them in respect of such warrant and proceedings, and for further relief.

The plaintiffs, on the 24th of December, 1838, upon

affidavits verifying the facts stated in the bill, obtained from the Master of the Rolls an injunction *ex parte*, restraining the Company “ from taking any further proceedings to assess the value of the piece of land in the bill mentioned under the statutes in the bill mentioned, or either of them, and from entering into possession of the said piece of land until answer or further order.”

The Company, on the 16th of March, 1839, filed their answer to the bill, stating, among other things, that the railway passes through the field numbered 32, and also passes for the extent of rather more than a mile through low ground near the river Calder, and is then carried, by means of cuttings, through a high ridge of ground sloping downwards to the Calder, and the piece of land containing 3*r.* 17*p.* is nearly at the top of such ridge, and rises to the height of fifty-six feet six inches from the level of the railway, and is of an oblong form, extending along the side of the railway for the distance of 123 yards, and, in width, from the railway to the outer fence of the piece of land forty-two yards, and that its average inclination from such outer fence is one foot in height to three feet and a half on the base line. That it will be necessary to carry the railway through the low grounds by means of an embankment of a mile in length, and of the average height of thirty feet; and that, for constructing such embankment, and for other works necessary for completing the railway, it will be necessary to remove and use not only the earth and materials excavated in the course of making the cutting, but also a very large quantity of earth from lands adjoining the railway, and, among others, from the 3*r.* 17*p.* [The answer then entered into a detailed statement to shew that the last-mentioned piece of land was the most eligible and proper piece which the Company could take for the above-mentioned purposes.] That the cutting having been completed through the field numbered 32, it was ascertained by the engineer of the Company, that a greater degree of

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inclination than had been originally contemplated was necessary for the due formation of the slopes of the cutting, and for the purposes last aforesaid; and that, in order to secure and protect the railway, it had become necessary to cut away and use a considerable portion of the 3r. 17p. That, in consequence of the heavy falls of rain which occurred in the autumn of the last year, it became still further evident that the inclination of such slopes must be still further diminished, and a portion of the slope, next to the piece of land last mentioned, having begun to give way, and to fall into and cover a part of the cutting or space, which had then been and still was to form the line of the railway, and it having been ascertained that, in order to construct that part of the railway which lies next to and alongside of the piece of land containing 3r. 17p., safely and permanently, and to prevent future slipping, it will be necessary to remove from the surface of such piece of land all the soil and clay thereon; therefore, not only is it necessary to take the whole of such piece of land for the purpose of such embankment, but it is also indispensably necessary for the permanent safety of the cutting.

The answer of the Company was supported by affidavits of their engineers and other persons. The affidavits on both sides contained conflicting evidence on engineering points: they are sufficiently adverted to in the Lord Chancellor's judgment. The Company moved to dissolve the injunction.

Mr. *Pemberton* and Mr. *Bacon*, for the motion.

Mr. *Kindersley* and Mr. *Cankrien*, contra.

March 20th.

MASTER OF THE ROLLS.—There can be no doubt, under the circumstances that have taken place, that, to some

extent at least, the Company are entitled to take this field, or a portion of it. According to the facts as they now appear,—being somewhat different from those apparent to the plaintiffs when the bill was filed,—in consequence of the slip that has taken place, it has become necessary for the safety of the field, and also of the railway, that there should be an alteration made precisely under the circumstances which authorize the Company to purchase; and, it being certain that there is a title to purchase some, it is by no means improbable that there is on the same ground a right to purchase all; for it is by no means improbable that the slope of this land is such throughout the whole field, that, in order to make the railway secure, it may be necessary to slope even from the further side of it down to the road; and, on the other hand, if it should not be necessary to take the whole, there may be left so narrow a strip, that the plaintiffs may, under the act, have a right to insist that the Company, whether they will or no, shall take the whole; and certainly, under these circumstances, it is very unfortunate that there should be this discussion respecting the right of the Company to purchase the land.

With respect to that right, I cannot, at present, think that it is so clear as is thought on the part of the Railway Company. Now, the 94th section does undoubtedly give a right to the Company to enter upon the land. [His Lordship read the 94th section.] It appears to me, upon the construction of this act, that, undoubtedly, the Company have a right to enter upon adjoining lands for the purpose of taking away and removing soil, proper or necessary for making, maintaining, altering, repairing, or using the railway: one of the purposes is making this embankment. It would appear, therefore, that, upon the construction of this act, they have a right to enter upon adjoining land, which this is, for the purpose of removing the soil, in order that therewith they may make the embank-

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ment. Then comes the question, whether, in order to do this, or for this purpose, they are authorized to purchase the land from which they remove the soil, or, whether that purpose may not be answered without purchasing the land, by taking away from the land of another that soil which they want, making compensation for the injury which is done; and it does not appear to me that this may not be the true construction of the act. Taking away the surface of the soil is doing a great injury; but still there is a basis or substratum left which may be valuable to the owner of the adjoining property, and he may have compensation for the taking away of that which is removed expressly for the purposes of this act. Now if this be so, then, when it was asked, or was demanded, to purchase this land upon the plea that the soil was wanted, the difficulty in the case arose.

This act contains powers which are to be exercised compulsorily upon other persons. It also contains powers which, though not to be compulsorily enforced, may be exercised by means of contracts entered into with other persons. The present plaintiffs are persons who represent themselves not at liberty to enter into any contract which they may think fit, but persons acting as trustees of a vicarage of which they hold a part of the endowment; and they say,—“ We cannot do this upon our notion that such a thing is or may be beneficial, but we are to submit to those things which the act of Parliament imposes on us.” Now, if the act imposes on them the necessity of submitting to have the soil taken away and removed, for the purposes of making an embankment in another part of the railway, they must submit to that; on the other hand, if the act does not for this purpose compel them to submit to a sale of the land, then they contend that they ought not to consent to a sale. That is the argument which I certainly understood to be addressed to me at the time when the injunction was first applied for. Then a correspond-

ence takes place between the parties. In June notice is given that the Company desire to take this additional piece of land. The answer which is made on the part of the plaintiffs, and it is not quite so explicit as it might have been, is—"We desire to know for what purpose you want this land, because, if it is for such a purpose as we are compelled to submit to sell, then we must submit; on the other hand, if it is a purpose in respect of which we are to contract with you, then we must consider the situation we hold as trustees." That is what this answer is now represented to mean; however, the simple question asked was—"What is the purpose for which it will be wanted?" And the answer, which is given on the 2nd of June, is—"It will be wanted for an embankment." Now, from that time, I think the 22nd of July, 1838, until the month of November in the same year, nothing further passes. There is no complaint made on the one side, and nothing done to urge the matter to a conclusion on the other; but on the 29th of November notice is given that the piece of land is wanted; and I think the notice goes on further to say, that an offer is made of 160*l.* for it, and that if it is not acceded to, further proceedings will be taken before a jury. There was not a very prompt answer given to that; but on the 12th of December following, the solicitor of the plaintiffs desired again to know for what the land was wanted, not being satisfied, and hinting in his letter that he was not satisfied, with the preceding answer which had been given. On the day following that, the warrant was taken out, upon which proceedings were to be founded before a jury; and on the 14th, a letter is written by Mr. Brackenbury, who was the clerk and agent of the Company, to Mr. Tenant, which was in answer to that letter, but gave no information at all respecting the warrant and the summons, and no information is given upon that until the 17th of December, when notice was given that the jury were to meet on the 29th. The bill is filed on the 22nd, and the

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injunction obtained on the 24th. The parties on both sides were a little fencing with each other. I do not think there was that free communication on the part of Mr. Brackenbury which one would wish to see, when he was writing on the 14th, not saying a word about the warrant having been issued on the 13th; and I think, if Mr. Tennant had in his mind all that is stated in the bill, it would have been better on his part to have communicated that to the other side with a little more freedom than he seems to have done. I do not, under the circumstances, think I ought to make any special order upon this occasion, on the ground that there has been any wilful suppression of that which took place between the parties; and I am really anxious to consider what order I can properly make for their mutual interest. The question is, whether I am to dissolve the injunction altogether. It appears to me, upon the circumstances stated now, that, as to some portion of the land, at least, the injunction ought to be dissolved. Certainly I have nothing before me to afford any proof whatever that the whole of this land may not be wanted for the purpose of an additional slope; and when I look at this model, and see the slip which has taken place, it may very possibly happen that the whole of this piece of land may be wanted for that purpose. It is said, that I ought not to dissolve the injunction on that ground, because the Company have said they wanted this piece of land only for the soil which it contains, even if it afterwards appear that they have a right to purchase this land for another purpose clearly provided for by the act, and shewn to be necessary by an occurrence which has recently taken place, that occurrence not appearing to have been communicated to the plaintiffs at any time before this bill was filed.

Upon the whole, not being persuaded that the entire piece of land may not be wanted for the latter purpose, I think the injunction ought to be dissolved, not for the reason that it was improperly granted, because I confess

that, under the circumstances which appeared at that time, without any relation to this matter, I do not think at this moment, I should have done otherwise than grant the injunction; but I think that the injunction ought now to be dissolved, seeing that this land may be wanted for the purpose provided for by the act. It has been strongly impressed on my mind, during the whole of this discussion, that there is quite a legitimate ground under the provisions of this act, I will not say for taking the whole, because I cannot tell that, but certainly taking a considerable portion of it, as necessary for the safety of the railway, which the defendants are bound to preserve. There are three roods of land,—there are certain portions of it necessarily required for the use of the railway in making this slope,—the remainder of it is less than half an acre, and the plaintiffs have a right to compel the Railway Company to take it. I therefore dissolve the injunction, and I hope that it may be understood that I do it on the ground that it appears to me that I have nothing to shew that the whole of this piece of land may not be required for the slope.

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The plaintiffs appealed.

The *Solicitor-General* and Mr. *Cankrien*, in support of the appeal motion.

The 94th section of the act empowers the Company to enter upon lands and to deal physically with them, with this qualification, that it must be done in execution of some or one of the powers of the act. The 96th section restricts them from taking a greater breadth of land than twenty-two yards, except in certain specified cases,—one of which is where an embankment, another where a cutting may be necessary. The question is, whether, under these or either of these sections, the Company have power to take land adjoining the railway, manifestly not required for either

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cutting or embankment at that precise point of the railway, because they can there get materials for making an embankment at a distant point at less expense to themselves than at the place where that embankment is being constructed.

There is in this act an omission (and it must be considered as designedly omitted) of a power to be found in other acts (*a*), to take earth from adjoining land for the purposes of embankments; and such presumption of omission is strengthened by the fact, that there is no clause providing for compensating the owner of lands so dealt with, for the compensation clauses only apply to land purchased, or to be temporarily taken possession of.

The pretext of wanting this piece of land for giving a greater slope to the bank of the cutting, is an after-thought never communicated to the plaintiffs until after the injunction was obtained.

Mr. *Wigram* and Mr. *Bacon*, contra.—The Company are authorized by the 96th section to take an indefinite breadth, for the purpose of cuttings in the line. The peculiar nature of the soil passed through may render the slope of a cutting greater or less, and therefore the breadth of the land to be taken for that purpose cannot be correctly and definitively ascertained until the strata of the different soils are known. The act makes the Company the judges of what width is necessary to be taken for the permanent security of the railway, impliedly regulating their discretion in that respect by what a Court of Equity would consider a reasonable exercise of it: it would be impossible to fix the exact requisite breadth of a cutting in the first instance; and to require more land, as the progress of the works disclosed the necessity for more, would obviously be attended with inconvenience and expense: the Com-

(*a*) London and Birmingham, and Hull and Selby Railway Acts.

pany therefore are not limited in the demand to be made in the first instance ; but the 162nd section provides, that what is not permanently required shall be reconveyed to the former owner.

The Vice-Chancellor has lately decided, that a proprietor, whose land is bodily carried away for the *bond fide* purpose of a railway embankment, is to be compensated under the clause relating to purchases of land (a).

It is said that the purpose of requiring the land for the increase of the slopes of the cutting is an after-thought ; but it is not disputed that this land-slip has taken place. Unless fraud be shewn in what is called the “ after-thought,” and it be shewn that the land is not wanted for the alleged purpose, how can the fact, that the same land was previously required, even if for an unwarranted purpose, prevent the land being taken for a subsequent legitimate purpose ?

The *Solicitor-General*, in reply.

At the time when the injunction was first granted, the purposes for which the land was required was one not warranted ; and, therefore, the injunction was properly granted. A subsequently discovered lawful purpose may be a reason for discharging the injunction on a further application, but cannot prejudice the injunction properly originated.

The LORD CHANCELLOR.—I will read the affidavits before I dispose of this case ; because, in fact, the whole question turns upon what is differently represented by the engineers on the two sides. Undoubtedly, I cannot sanction a proceeding which would make me the judge of these engineering questions ; but I must look at them for the

(a) See *Innocent v. The North Midland Railway Company*, ante, p. 242.

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purpose of seeing whether this transaction is *bond fide* upon the powers given by the act, or whether it is a mere colour to cover another object, which there seems to be some reason to suspect, at least, in the commencement. It must be considered, whether subsequent events have given the Company a title which they had not in the beginning; at the same time, whatever might be the object in giving the notice, if it appears that there now is a right, I do not think that would be a ground upon which this Court would interfere to prevent them exercising that right. I certainly cannot sanction their judging this piece of land to be necessary for the purpose of the slope, in order to enable them to take it for a purpose totally and entirely distinct; at the same time, I cannot so deal with the matter as to compel them to carry on these works under the direction of the Court, or take upon myself to decide on an engineering question, as to whether a particular piece of land is or is not necessary. I will look at the affidavits for the purpose of satisfying myself how far the parties are attempting to take this land for a *bond fide* purpose provided for by the act. It is a very small question, and it is a great pity the parties cannot themselves arrange it. There is another point—I cannot sanction any proceeding by which a party comes here for the purpose of making a better bargain, which, on the side of the plaintiffs, I think is not impossible to be the case; I should otherwise allow a large portion of the time of this Court to be taken up in a manner which would lead to an intolerable nuisance.

April 13th.

LORD CHANCELLOR.—I have read these affidavits, which leave the real question between the parties in a very unsatisfactory state. I have also read the judgment of the Master of the Rolls; and, upon reading that, I clearly understand some expressions which I certainly did not

quite comprehend the bearing of when they were referred to. I understand the Master of the Rolls to say, that he considered the plaintiffs bound, as they certainly are, to make out that what is proposed to be done by the Company is beyond the powers of their act; and that the plaintiffs had not made out to his satisfaction what portion of this field was beyond the powers of the act, and therefore had not made out their case; not, as I collected at first, that he considered, that, because the Company have a power over part, therefore he would not interfere; but he considered the plaintiffs as not having succeeded in making out their case as to the part which they sought to have protected.

I am sorry to say, in looking at the affidavits, I am very much of that opinion; because it is quite clear, I think, that the Company are entitled, at least, to a very considerable portion of this field. The Master of the Rolls was of the same opinion. If it had not been for some expressions in the affidavit, which has been filed on the part of the Company, I should have felt very little doubt that they were not entitled to the whole. An engineer of the Company has sworn that he considers the whole necessary. Now, if I look to what was originally stated as the purpose or object for which the earth was required, I find it to be for making an embankment at a short distance off,—that was the only purpose originally suggested, and, throughout the last affidavit, it is still treated as one principal reason; and when I find also that the extent of this land from the line of the railway is greater than necessary to make a slope of even the most gradual inclination ever suggested to have been made upon any railway, I have great difficulty in coming to the conclusion upon that affidavit, that the whole of this land is necessary to be taken; and if the affidavit on the part of the plaintiffs had been more specific than it is, and had enabled me to say what part of the land was necessary, and what part was not, I think I should have seen what was the right course to be adopted

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with regard to the matter in question,—which is simply, what portion of this field is fairly required, and may be adjudged to be required for the purpose of cutting. I throw out of consideration entirely, that which has in fact been abandoned at the bar,—any case independent of such a case as comes within the clause of the act authorizing a purchase. Now, the plaintiffs, in answer to this direct allegation—that the whole was required—state, in very general terms,—“That the parcel of land so cut off from the field No. 32 adjoins upon the railway for the length of 114 yards, or thereabouts, and that a portion of twenty-two yards in such length has slipped and fallen in upon the railway in the part of the slope or cutting as delineated in their plan marked A., and in such plan marked ‘slipped ground;’ but that the slope in the other part of the length is at present sound, although it may require to have a slope of two feet to one foot given to effect its ultimate security; and that such slip or fall of the slope or cutting appears to have taken place from the breaking out of a spring of water, which has forced the soil and subsoil forward upon the slope and railway; and that it will be necessary to carry off the water which breaks out from the spring; but that there is no occasion to break into the surface of the piece of land containing 3r. 17p., above the place where the spring has broken out and washed away the surface. That, from a computation made, the additional quantity of land which the Company would require to take from the piece of land containing 3r. 17p., in order to construct the slope upon such a maximum base line of two feet in length to one foot in perpendicular height, would be twenty feet in width, and may be required to be taken as high as the slope.” Now, the slope exceeds the twenty feet; it is, therefore, impossible to come to any satisfactory conclusion upon that affidavit, as to what portion of the land, according to the statement of the practice of engineers, will or will not be necessary for effecting the slope in this par-

ticular piece of land. I am very unwilling to dispose of the case in this state of the evidence, because I think it is one of very considerable importance. In either view of the case, the contest is in fact merely about money: it is quite clear these proprietors cannot want a slip of twenty or thirty yards; therefore, the contest is merely about the price. At the same time, it is extremely important to watch over the interests of those whose property is affected by these Companies, to take care that the Company shall not, by any misrepresentation they may make, (if they have made any), be permitted to exercise powers beyond those which the act of Parliament gives them. The powers given to these Companies are so large, and frequently so injurious to the interests of individuals, that I think it is the duty of every Court to keep them most strictly within those powers; and, if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me by way of construction of the act (*a*).

I have then here the exact measurements and the description of the soil not contradicted. There seems, therefore, every possible material necessary to enable a scientific person—an engineer—to come to a satisfactory conclusion as to what would or would not be necessary to be taken, in order to effect, and securely to effect—for what may or may not be necessary in order to carry into effect a work like this is not to be measured by inches—and which may, giving the utmost latitude to the construction of the act, be judged necessary in order to secure the slope to this part of the railway. I apprehend, therefore, that there will not be any difficulty whatever in getting the opinion of some person, beyond all suspicion, unconnected with the parties and the work in question, who, taking the evidence of the facts as they appear upon these affidavits, would

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inform me what portion of this field, in his opinion, will be necessary to be taken, in order effectually to secure the work in question, that is to say, the cutting; and, if the plaintiffs wish to furnish me with any evidence of that sort, I will postpone the further consideration of this case, with liberty for each side to produce to me affidavits upon that point.

Affidavits were filed by engineers and scientific persons on both sides; and the case was mentioned on the 20th, 24th, and 27th of April,—on the last of which days a reference was, by consent, made to an engineer to report to the Lord Chancellor on the subject. The following order, which recites the report of the engineer, was subsequently made :—

*Wednesday,
 May 8th.*

Whereas, by an order, dated the 27th day of April, 1839, it was ordered, that it should be referred to Mr. Joseph Locke, engineer, to read all the affidavits in the order mentioned, and to inspect the plans, sections, and the models therein mentioned, and to state whether, in a due course of workmanship, and for the permanent security of the part of the railway abutting on the close in question, it was necessary that the whole of the land in question should be taken, and, if not the whole, then to state how much was necessary; and it was ordered, that the said Joseph Locke should state the grounds of his opinion, but the order was to be without prejudice; the Railway Company, by their counsel, undertaking to do nothing until after the said Joseph Locke should have made his report; and it was ordered, that the motion should stand over in the meantime. That, by the report of the said Joseph Locke, dated the 4th day of May instant, made in pursuance of the said order, he certified that he was of opinion, that it is not necessary that the whole of the land in question should be taken, but that it would be proper to take so much as would enable the Company to form the slope at the rate of

two feet horizontal to one foot perpendicular, besides a space of ten or twelve feet in breadth along the whole length of the field; and in that space he recommended a drain should be dug, so deep as to catch the springs of water that appear to exist in the higher land; and that such water should either be carried along the drain for the entire length of the field, or that proper channels be made on the slope for carrying it into the ditches on the level of the railway; and he was of opinion, that this mode would prevent the slipping of the sides of the cutting, even without having recourse to "stone pitching," as suggested in the plaintiffs' affidavits; but, with the addition of this latter mode, he had no doubt that the railway might be made perfectly secure, without requiring any additional land beyond the slopes of two to one, and a strip of ten or twelve feet for the drain; and he stated, that it would appear that the whole of the land in question is required for forming the embankment across the low ground which immediately adjoins it; and that there is no other land so eligible for the purpose as that under consideration: And whereas, Mr. *Solicitor-General* and Mr. *Cankrien*, of counsel for the plaintiffs, this day moved and offered divers reasons unto the Right Honorable the Lord High Chancellor of Great Britain, that the order made by the Right Honorable the Master of the Rolls, on the 20th day of March instant, for dissolving the injunction granted in this cause, might be discharged with costs; in the presence of Mr. *Wigram* and Mr. *Bacon*, of counsel for the defendants: Whereupon and upon hearing the said order, dated the 27th day of April, 1839, and the said report of the said Joseph Locke read, and what was alleged by the counsel on both sides, His Lordship doth order, that an injunction be awarded against the defendants, to restrain them from proceeding before a jury to assess the value of and take under the powers of the acts of Parliament, in the pleadings mentioned, any larger or other part of the field,

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numbered 32, in the pleadings mentioned, than will enable them, the defendants, to form a slope next to the railway, at the rate of two feet horizontal to one foot perpendicular, besides twelve feet in breadth along the whole length of the said field, numbered 32, according to the report of the said Joseph Locke, until the further order of the Court.

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August 16th.
Sept. 11th,
23rd.

Between JOSEPH FARROW, - - - Plaintiff,
and
HENRY VANSITTART and Others, and the
DEAN and CHAPTER of DURHAM, - Defendants.

The plaintiff was a lessee for a term of twenty-one years of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, seams of clay, with full and free authority and power to enter and cut down, and to dig, win, work, get, and carry away the same, with free ingress, egress, way-leave, and passage to and from the same, or to or from any other mines, quarries, and seams of clay, on foot and on horseback, and with carts and all manner of carriages; and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways in and over the demised premises, paying reasonable damages.

THE bill stated, that, by an indenture, dated the 28th of September, 1835, the Dean and Chapter of Durham did demise, grant, and to farm let, unto the plaintiff, his executors, administrators, and assigns, a certain farm, tenement, and lands, with the appurtenances, situate and being in the township of Cooper-Bewley, in the county of Durham; there being always excepted and reserved to the Dean and Chapter the woods, underwoods, and trees, then growing, or thereafter to grow, on the demised premises,

The Vice-Chancellor, inclining to the opinion that the reservation did not enable the lessors to grant to a public company a license to make a railway for the purpose of conveying passengers and general merchandize, but was only intended to enable the lessors or their grantees to convey mineral produce and wood from the demised lands to or from adjacent lands, granted an injunction, restraining the lessors and their licensees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a Court of Law.

Upon affidavits filed by the licensees, stating that the proposed railway was intended to be used for purposes and objects which should be held to be within the terms of the reservation; that the primary purpose of the railway was to convey mineral produce, and the scheme of general traffic a secondary object; and shewing that there was a considerable quantity of coal in the neighbourhood of the demised land, the injunction was dissolved.

Held, by the Lord Chancellor discharging the latter order and restoring the injunction, that this being a question for a Court of Law, upon the construction of the reservation, the property ought to be protected, pending the necessary trial at law; and it was made a condition of granting the injunction, that the plaintiff should proceed to a trial of the question at the earliest possible opportunity.

and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down, take, and carry away the said wood and trees, and to dig, win, work, get, and carry away the said mines, quarries, and seams of clay, with free ingress, egress, and regress, way-leave, and passage to and from the same, or to or from any other mines, quarries, seams of clay, lands, and grounds, on foot and on horseback, and with carts and all manner of carriages; and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid; and particularly of laying, making, and granting waggon-ways in and over the premises or any part thereof, paying reasonable damage for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties: To hold the said demised premises, with the appurtenances, (except as before excepted), unto the plaintiff, his executors, administrators, and assigns, for the term of twenty-one years, yielding and paying therefor yearly the sum of 4*l.* 10*s.*, in manner and at the times therein mentioned. That, in pursuance of an act of Parliament made and passed in the year 1828, and of several subsequent acts passed for that purpose, a main line of railway, called the "Clarence Railway," was made and completed, terminating on the margin of the river Tees, in the township of Billingham, in the county of Durham, and a branch railway to the said river at the town of Stockton. That considerable quantities of coals and other articles of commerce, and a considerable number of passengers, have been for some time past, and are now, conveyed along the Clarence Railway. That, in the year 1837, a joint stock company, to be called the "Stockton and Hartlepool Railway and Dock Company," was projected, for the purpose of making a railway to commence from the Clarence Railway, in the township of Billingham, and passing through that and certain other townships, to terminate at or near the town of Hartlepool. That the defendant Vansittart and

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the other defendants (other than the Dean and Chapter) were duly appointed, and now are the directors of the Stockton and Hartlepool Railway Company, and are hereinafter distinguished as the directors, defendants. That the defendants, the directors, and Robert Rayson, land-agent, and R. W. Jackson, solicitor, also defendants hereto, are sixteen of the shareholders of the Company, and the other shareholders exceed sixty in number, and their names are unknown to the plaintiff. That, in the year 1838, a prospectus of the intended Company was circulated, which stated, amongst other things, that one of the many important objects of the undertaking was to afford to the numerous and valuable collieries, in the south-western districts of the county of Durham, a cheaper and more expeditious means of export than they at present possessed. [The prospectus proceeded to detail the facilities for completing the estimated advantages, the sources of, and the probable revenue to be derived from the undertaking, including, among other sources of income, that to arise from one thousand passengers.] That no act of Parliament has been obtained for incorporating the Company. That the lands comprised in the indenture of lease to the plaintiff are situate in the line of the intended railway; and in the month of September, 1838, the defendants Rayson and Jackson, being shareholders in and acting for the Company, informed the plaintiff that the Dean and Chapter had granted, or had undertaken to grant, to the Company a license under their chapter seal, under and by virtue of the reservation of right of way contained in the indenture of lease, to empower the grantees to enter upon the lands demised, and to mark out the line of railway, and to rail off so much of the lands as might be required, and thereupon to make and lay down the railway, as to the grantees might seem expedient; and they requested permission to mark out the line of the railway over the lands. That the plaintiff, considering that the reservation of right of way

contained in the indenture of lease, only authorized the Dean and Chapter and their grantees to make an ordinary private railway with a single line of iron rails across or over the lands demised, for the purpose of conveying coal and other mineral produce from the lands demised, or from other lands, and that the Dean and Chapter and their grantees had no power under the reservation to make a railway with a double line of rails, for the purposes of general traffic, as set forth in the prospectus, refused to comply with the request. [The plaintiff's dissent to the railway passing through the demised lands upon any terms was subsequently repeated in a correspondence by letter between the solicitors of the plaintiff and the defendant Jackson.] That, notwithstanding such refusal, the defendants, the directors, in the month of April, 1839, caused certain labourers to cut gaps in the fences in the demised lands, and to drive pegs of wood into the ground to indicate the line of railway. [The bill then stated the conviction of such labourers for a trespass before a magistrate.] That the defendants, the directors, have contracted with Mr. T. Hutchinson to construct the railway over the demised lands; and on the 1st of July, 1839, T. Hutchinson marked out the line of the railway, and broke down the fences which crossed the line, and railed off a portion of the lands, being about fifty feet in width and three hundred yards in length, and the line so marked out crosses three fields,—one of which consists of old meadow land. That, on the 4th of July, 1839, Hutchinson and his workmen began to and are now employed in cutting through, breaking up, excavating, or carrying away the soil from a portion of the demised lands; that if the old meadow land be broken up, it cannot be restored to its present state for several years.

The bill charged, that the ordinary waggon-ways made and used in the county of Durham, for the conveyance of mineral produce from mines and quarries, are laid down with a single line of rails only, and, according to the

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custom of the country, double lines of rails are not used in such waggon-ways. That all the railways in the county of Durham which are laid down with double rails have been made under the authority of acts of Parliament. That the reservation in the indenture contained does not reserve to the Dean and Chapter or to their grantees the right of making any other or more extensive waggon-ways than those in ordinary use in the country. That the portion of the lands which has been railed off is of the proper and necessary width for the construction of a railway with a double line of rails, and is much wider than is necessary for a railway with a single line; and the railway, when completed, is intended to be used for the conveyance of merchandize and passengers, and for general traffic, as specified in the prospectus, and tolls are intended to be taken and levied for the carriage of the articles conveyed along the railway. The bill prayed a declaration, that the Dean and Chapter of Durham and their grantees are not entitled, under or by virtue of the reservation contained in the indenture of lease, to make or cause to be made any railway upon, through, or over the lands comprised in the said indenture, other than one with single lines of rails, for the purpose of conveying coal, clay, stone, and other mineral produce from and out of the mines, quarries, and seams of clay within the lands of the plaintiff, or from other mines, quarries, seams of clay, lands, and grounds, and for no other purpose whatever; and that the defendants, the directors and shareholders of the Company, may discover the object of the intended railway, and for what purpose in particular, and for the conveyance of what articles in particular, the railway is intended to be used and applied when completed; and that, if necessary, a case may be sent to one of her Majesty's Courts of Law, or one or more issue or issues may be directed to be tried at law for ascertaining and determining the true construction, extent, and meaning of the reservation contained in the indenture of lease, and

for trying whether the intended railway is or is not intended to be in fact such a railway as the Dean and Chapter are entitled to make and construct, or cause to be made or constructed, upon, through, or over the lands comprised in the indenture of lease, under and by virtue of the said reservation; and that all the defendants, their servants, workmen, and agents, may in the meantime be restrained from cutting through, breaking up, excavating, carrying away, or in any manner injuring or destroying the soil and surface of the portion of the lands which have been marked out as aforesaid, or the soil or surface of any other portion of the lands demised, for the purpose of the railway, or for any other purpose connected with or relating to the intended railway. And for further relief.

The plaintiffs, on affidavits verifying the facts stated in the bill, obtained an *ex parte* injunction on the 24th of July, 1839, restraining the Company from cutting through, breaking up, excavating, carrying away, or in any manner injuring or destroying the soil and surface of the plaintiff's lands in the bill mentioned.

NOTICE of a motion to dissolve the injunction having been given,

August 16th.

Mr. *Girdlestone*, Mr. *Chandless*, and Mr. *Collins*, moved accordingly.

[Affidavits had been made in support of the motion, but had not been filed in sufficient time to allow of their being used on this occasion. One affidavit only, filed in support of the motion, was read, by which J. Turner, who had made an affidavit in support of the facts stated in the bill, deposed that, in his former affidavit, he did not intend to imply that the railways or waggon-ways in ordinary use in the county of Durham are laid down with single lines of rails only; for that, where single lines are adopted,

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sidings or passing-places are invariably made at certain intervening distances, being absolutely necessary for conducting the traffic upon them.]

Mr. *Knight Bruce* and Mr. *Faber* opposed the motion.

[The substance of the arguments sufficiently appears by the several judgments pronounced in the course of this case.]

The VICE-CHANCELLOR.—In the course of the argument, with regard to the lease, it has been asserted, that the expression “laying, making, and granting,” is to be taken as disconnected from the words preceding it, namely, “for the purpose aforesaid;” it must, therefore, be considered, if that can possibly be done, adverting to the known rules of construction.

According to the construction contended for, the expression “laying, making, and granting,” if it be not referred to the words “powers whatever for the purposes aforesaid,” must be referred to the words, in the beginning of the sentence, “full and free authority and powers.” I will assume that to be the true construction, and the reservation to stand thus:—“full and free authority and power to cut down, take, and carry away the wood, and particularly of laying down, making, and granting waggon-ways.” Upon that hypothesis the sentence would be ungrammatical; whereas, if you thus read the sentence,—after having received power to do certain things,—“and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatever for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways,” then the expression is in accordance with the grammatical rules of the English language; because it would be, “all powers whatever for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways:” in no other view of construction can the sentence stand, when tested by the ordinary rules of gram-

mar. Supposing the last construction to be the correct one, then the power of "laying, making, and granting waggon-ways" will be "powers that are necessary and convenient for the purposes aforesaid." Now "the purposes aforesaid" are those of carrying away the wood and trees and the produce of the mines, quarries, and seams of coal, and having ingress, egress, and regress, and passage to and from the same,—that is, from the places where the mines may be situate. It is obvious to me, that the Dean and Chapter did not intend to reserve to themselves the unlimited right of making roads and ways of any description, and in any direction, for all purposes whatever, but that the power of making ways, which is reserved, is a power with reference to what precedes it, namely, that of going to and from their own mines, including the case of mines of other persons, as to which it might be advantageous to them to give a passage for the coals and minerals of those persons over their own lands. That such was the meaning of the reservation clause, I can well understand; but it is clearly not, as it appears to me, a power reserved of making ways generally; and if they had intended to reserve to themselves the more extensive power, it would have been easy to have expressed that in unambiguous language. That has not been done. It has always appeared to me to be a wholesome rule to attend to in construing legal instruments, where the assertion is, that a certain set of words have a particular meaning, to consider whether, if that particular meaning had been the object of the parties, they might not have so expressed it in the plainest and clearest language. It is clear to me in this case, that the Dean and Chapter might have easily expressed the imputed intention, but that they have not done so.

✓If, then, the ways which the lessors have reserved the power of making are ways for limited purposes, it is no answer to the lessee, who complains of the making of a different kind of way and for other purposes, to say, that by the

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last mode no more land is to be taken than would have been taken for the reserved limited purposes; because the lessees have contracted with the Dean and Chapter on the terms, that they shall only have the reserved right for particular purposes; and he might very well consider, adverting to what is the spirit and meaning of the passage, that he was not thereby subjecting himself to an unlimited right of making a way over his lands for objects not specified in the exceptions, which either the Dean and Chapter, or persons claiming from them, might think fit to exercise. If that be the true view of the case, the lessee has a right to say, that, whether the lessors take that portion only of the land which would be required for the reserved purposes or not, is immaterial; because they have no right to take the land at all, except for the objects specified; the case, therefore, as I understand it, resolves itself *ab initio* into a case of trespass.

In cases of this nature, where the Court is of necessity called on to put a construction, for the purpose of determining whether an interim injunction shall be continued or not, I think the Court is bound to act on that which does with reasonable clearness appear to be a right construction. I acted on this rule in a late case relating to the Southampton Railway (a). My view of the construction in that case might have been wrong; at the same time, it appeared to me to be so clear a case, that I thought it right to refuse an injunction, although it was a case which, in another view, would have amounted to a considerable and injurious trespass. The rule is the same where the injunction has been obtained *ex parte*. I cannot but think that the construction of this instrument, as I have stated it, is the true one; and, therefore, I am bound to continue this injunction; neither do I see any mode in which it should be varied: I do not see why it should not be continued

(a) Attorney-General, at the relation of *Walton v. The London and Southampton Railway Company*, *ante*, p. 302.

against the Dean and Chapter, for they are manifestly interested in having the license restricted to the limits within which they give it; and it appears to me, that if the injunction is to be maintained at all, it should be maintained against them.

It also occurs to me, that whenever the position of the circumstances is such, as that the defendants shall be able to shew distinctly to the Court, that they only mean to make a railway in accordance with the true construction of the reservation in the lease, then they may apply to have the injunction dissolved. I think, also, that the question ought to be put in a train for a legal decision on the point.

The defendants filed affidavits in support of a further motion to dissolve the injunction, and thereby stated, that the plan which, as stated in the bill, had been projected in 1838, for constructing a railway and dock, had been abandoned. That subsequently, and in 1839, a Company was formed for making a railway, to be called the "Stockton and Hartlepool Railway," the intended line of which takes a nearly similar direction through the plaintiff's lands, and that all the persons named in the bill as defendants, directors, with the exception of five of such persons, are shareholders in the intended Stockton and Hartlepool Railway. That the Dean and Chapter of Durham have, by indenture, dated the 18th of June, 1839, under their common seal, granted to three of the shareholders, by virtue of the powers reserved in and by the plaintiff's lease, a right of way-leave and passage over the plaintiff's lands, not exceeding in width fourteen yards, except where sidings or passing-places, cuts, batteries, bridges, toll-houses, or other erections, or engines or machines shall be required, for a term of twenty-one years. That the intended railway is being constructed, and is intended to be completed within the limits prescribed, and in conformity with the powers of the deed of the 18th of June, and no

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greater quantity in width of land has been or is intended to be taken than is therein authorized; and the railway, when completed, is intended to be used only for such purposes and objects as are authorized by the reservations in the lease to the plaintiff. That such last reservations are those which have been introduced for a great length of time in the Dean and Chapter's leases, in accordance with which similar powers and rights of forming railways, as now granted by the indenture of the 18th of June, have been in numerous instances granted, and are now being enjoyed. That the terms on which the Dean and Chapter usually, under reservation in their leases, grant powers to make railways are for terms of twenty-one years, the grantees to take fourteen yards of land in width, and such additional quantity in width as may be requisite for cuttings or embankments; that several of the railways thus authorized are laid down with double lines of rails. That the quantity of the plaintiff's land which has been railed off is not more than the proper quantity of land required for making either a single line of railway with a proper siding or passing-place, or for making a double line of railway.

That the primary and *bond fide* object of making the intended private waggon-way or railway is to carry along the same mineral produce, and that, as an entirely secondary idea or consideration to such primary object, it was also intended to use the same for the purposes of general traffic, and for the transit of passengers, provided the grant of way-leave from the Dean and Chapter could authorize the Company, or they could be otherwise legally empowered so to do, but not otherwise; and that the parties composing such private association do not mean, under or by virtue of such grant of way-leave, to use the railway for the purposes of general traffic, and for the transit of passengers, if, in the judgment of the Court, it should be considered that they have not the power to do so. That, by the intended railway, a communication will be opened to and from mines and quar-

ries and lands belonging to the Dean and Chapter and other persons, including such as are now being worked, as also those in progress of being opened.

The five defendants, directors, above alluded to, denied by affidavits, that they were directly or indirectly engaged in promoting or forming the railway.

By affidavits, in reply, it was stated, that the common coal-railways or waggon-ways, in the county of Durham, are generally single lines except at the sidings; that the breadth of the plaintiff's land intended to be taken is much more than necessary for a single-line railway with passing-places.

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THE defendants, the directors, moved in pursuance of a notice for that purpose to dissolve the injunction (a). Sept. 11th.

Mr. *Girdlestone*, for the Company. Mr. *Walters*, for the Dean and Chapter.

Mr. *Purvis* and Mr. *Faber*, for the plaintiff.

The VICE-CHANCELLOR was of opinion, that, it being shewn by the affidavits that there was a large field of coal existing in the neighbourhood of the plaintiff's land, and inasmuch, therefore, as the railway might be used for a lawful purpose, the injunction ought to be dissolved; but gave the plaintiff liberty to apply, if the Company should at any time use the railway for any other traffic than the transport of coals.

(a) The motion was heard by his Honor the Vice-Chancellor, at Studley Park, Ripon.

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THE plaintiff appealed to the Lord Chancellor.

Mr. *Wigram* and Mr. *Faber*, for the motion.

Mr. *Girdlestone* and Mr. *Collins*, for the Company.
Mr. *Walters*, for the Dean and Chapter.

THE LORD CHANCELLOR.—As far as the Dean and Chapter are concerned, I shall give them liberty to act according to the terms of their reservation; I do not think that they can require more. They are not interested in this particular Company; they are interested in not having any powers really reserved to them invalidated. On the construction of the reservation, I express no opinion: it is a purely legal question. The sole question now is, whether I ought to allow the Company to go on and do that which I think their own surveyor states is actually to destroy the face of the land; that is, to make level ground of that of which at present there is no portion level; or whether that operation should be suspended till the parties have an opportunity of taking the opinion of a Court of Law. Between the inconvenience of delay in their works on the one side, and of having a farm cut up on the other, there is no balance. If it were necessary to say in which way my opinion preponderates, I should say it is in favour of the plaintiff; but I abstain from giving any opinion on the subject. It is not a question for the decision of a Court of Equity.

The order must be to continue the injunction, except as to the parties who have disclaimed; putting it on the plaintiff to bring an action, and to go to trial at the earliest possible period.

[The counsel for the defendants stating, that the Dean and Chapter would by the injunction be prevented from

granting any way-leave, even within the plain terms of the reservation, the Lord Chancellor observed, that such was not the intention of the Court; and he directed that the order should be prefaced, by declaring that the intended railway is not within the powers reserved in the lease; and ordered that the defendants should be restrained from going on with the railway, without prejudice to the right of the Dean and Chapter to make or authorize the making of any way-leave within the terms of the reservation.]

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The 69th sect. of the Hull and Selby Railway act, provided that in all cases in which, in the exercise of any of the powers thereby granted any part of any quay, wharf, or other communication, either public or private, be found necessary to be cut through, taken, or so much injured as to be impassable or inconvenient for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company should at their own expense, before any such quay, wharf, or other communication should be cut through, taken, or injured as aforesaid, cause another good and sufficient quay, wharf, or other communication to be set out and made instead thereof, as convenient for transporting, conveying, landing, shipping, or depositing of goods or merchandize, as the quay, wharf, or other communication so to be cut through, taken, or injured as aforesaid, or as near thereto as might be.

THE HULL AND SELBY RAILWAY COMPANY, Defendants.

THE bill stated the act incorporating the Hull and Selby Railway Company (a), and empowering them to take land for the purposes of their undertaking; and stated sect. 10, empowering the Company to raise or sink any roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway, the Company

(a) 6 Will. 4, c. lxxx.

The railway was made to pass in front of a wharf belonging to the plaintiff, separating the frontage thereof from the water; but the Company had made a jetty or communication leading from the water to the wharf. The plaintiff obtained an injunction *ex parte*, restraining the Company from prosecuting any works which would render the plaintiff's wharf inconvenient for its purposes, until they had made another good and sufficient wharf as convenient as the old wharf, or as near thereto as might be.

Held, on motion to dissolve the injunction, that the injunction should be continued until after the trial of an action at law, on the question, whether the plaintiff was entitled to have a wharf such as he claimed made for him, in which action it was to be admitted, that the Company had made a jetty, as represented on a model produced by them.

That the Court would not in the meantime permit the defendants to proceed with their works, unless it was clear that the Court would have jurisdiction to deal with such works as it should think proper after a trial at law.

That the plaintiff, in such a case, is entitled to an injunction restraining the prosecution of works, notwithstanding these works are so far advanced, that such further prosecution thereof would not be prejudicial to the plaintiff, and the only effect of the injunction would be to restrain the Company from completing the railway.

The Court in exercising its jurisdiction to prevent companies, intrusted by the legislature with large powers, from acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers, for the purpose of giving effect to exorbitant claims against the companies.

Although an injunction obtained *ex parte*, upon a statement in which material facts are concealed or misrepresented, would, on a speedy application, be dissolved with costs; yet, it is not a sufficient ground for a motion to dissolve that injunction, after a period of several months has elapsed before notice of such motion is given; nor will the question, whether there has been such concealment or misrepresentation, be taken into consideration on appeal from an order made by the Court in which the injunction was granted, and by which order the injunction was continued and the costs reserved.

doing as little damage as might be in the execution of the several powers thereby granted; sect. 22, empowering all persons, by the act capacitated to sell and convey lands in the line of the railway, to accept and receive satisfaction for the value of such lands, and also compensation for any damage by them sustained by reason of the execution of the railway works, and for or on account of any damage, loss, or inconvenience which might be sustained by such persons by reason of the execution of any of the powers of the act; and sect. 26, prescribing the process for ascertainment by jury of the value of land to be taken, used, damaged, or injuriously affected by the execution of any of the powers of the act. The bill then stated the 69th sect., which is the section chiefly material to this case, and is in the following words: "And be it enacted, that in all cases in which, in the exercise of any of the powers hereby granted, any part of any carriage, horse, or foot road, railway, or tram-road, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication (as the case may require) to be set out and made instead thereof, as convenient for passengers, cattle, and carriages, and for transporting, conveying, landing, shipping, or depositing of goods or merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be."

The bill then stated, that, before and at the time of the passing of the act, the plaintiff was the owner of a very

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valuable pottery, and of certain messuages and pieces of land, situate on the bank of the river Humber, and also of part of the foreshore of the river lying in front of the said premises; and also of another piece of land or foreshore extending across the frontage of a certain messuage and premises on the Humber bank; and had for a considerable time carried on a very valuable and improving trade; and had some time since, at great expense, erected a wharf or quay in front of the pottery, extending down to the river, and covering an area of about one thousand three hundred yards, and being of the greatest value and importance to the plaintiff, as the means of carrying on his pottery business; the plaintiff being in the habit of receiving the whole of his raw materials, coals and other articles used in his pottery, by water carriage, and of landing the same on the wharf, and again shipping his manufactured goods into vessels lying alongside the wharf for the purpose of exportation. That the wharf was so constructed and situated, as to secure to ships and vessels lying alongside of it, those advantages which are peculiarly necessary for the safe and convenient loading of earthenware and goods, inasmuch as it extends so far over the shore of the river as to admit of vessels floating alongside, and lying there out of the stream or current, which is very rapid and dangerous, and also to admit the same ships and vessels to rest in safety at low water upon the mud alongside of the wharf, so as to receive a cargo without risk of damage.

That finding, before the passing of the act, that it was proposed to carry the line of the railway along the foreshore of the Humber in front of the wharf, the plaintiff came up to London for the purpose of opposing the bill in Parliament, when it was agreed, between the plaintiff and the promoters of the bill, that the 69th section of the proposed act should be worded as it now appears, in order to secure to the plaintiff the erection of another wharf by the Com-

pany as good and convenient as the circumstances admitted of, and compensation for the loss and inconvenience which the plaintiff would sustain by such substituted wharf, even though the same should be equally large and well constructed, being differently and less advantageously situated than the present wharf.

That Mr. H. Broadley, one of the chief promoters of the bill, and acting on behalf of himself and the intended Company, wrote and gave to the plaintiff a letter, dated the 18th of March, 1836, as follows:—

“ Sir,—I consider the clause (69th) in the Hull and Selby Railway Act, respecting roads, communications, &c., interfered with, includes your case in respect to the communication between the Humber and your pottery.

“ H. BROADLEY.”

That, relying on such arrangements, the plaintiff forebore to make the opposition which he otherwise intended to have made to the railway bill. That, after the passing of the act, the Company being about to take possession of the said pieces of foreshore of the river, but not having in any manner as yet interfered with the free use and enjoyment by the plaintiff of his wharf or quay, he caused the Company to be served with certain notices or claims for compensation, as follows:—[The bill set forth two notices, dated respectively the 16th and 21st days of March, 1837; the first, requiring the sum of £5350 to be paid to the plaintiff, over and above the specific performance therein-after mentioned, for the land required, and for the loss and injury which the plaintiff would sustain by the taking of the pieces of foreshore; and specifying in detail the particulars of such loss and injury, and claiming a specific performance of the 69th clause, as respects the wharf, namely, that another good and sufficient wharf should be set out and made before the Company proceeded to render the present one inconvenient or insufficient for the landing or stowing of goods: the second notice, requiring payment

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of the further sum of £200, in respect of injury omitted in the first notice.] That the Company offered to the plaintiff the sum of £940 as the value of the land and damages; that a jury was impanelled, and the sum of £1253 awarded in respect thereof.

That the Company did not, until very lately, approach the plaintiff's wharf or quay, but had, within the last three weeks, begun to construct the railway in front and on either side thereof, and they propose to construct the same in such a manner on the foreshore, that the same, when completed, will entirely shut out the river from the said wharf, and will prevent the river, even at high water, from flowing up to the wharf or quay. That the Company are now forming on the foreshore, in front of the wharf, a ditch or cutting of the length of 140 feet, and of the depth of four feet, and the breadth of ninety feet, being the dimensions of the bed of the railway, and are throwing into such cutting quantities of chalk and rubble for the foundation of the railway.

That the Company, being conscious that they were bound to comply with the 69th section, did, on the 6th of July last, put down eight piles having seven transverse pieces of unhewn plank laid upon them, extending from the extremity of the wharf over the intended bed of the railway into the mud or foreshore; and they insist that the plaintiff is not entitled to have, and shall not have, any other or better wharf constructed for him, in lieu of his present wharf or quay, than the rough wooden staith so constructed as aforesaid. That the present wharf has a frontage of 140 feet, together with a return on one side of eighty-four feet, and on the other of forty feet, the whole line of which is at high water washed by the river, making a total of accessible frontage to the river at high water of 265 feet, to the whole of which vessels may approach at high water, and along which they may lay upon the mud at low water, and receive and discharge their cargoes. That the whole of the plaintiff's

present wharf is built upon a strongly piled foundation, having a boundary wall carried up from the foundations to the level of the wharf, of a thickness of from six to eight feet, and the wharf is an area, containing thirteen hundred square yards, firmly and solidly built, and founded and supported by such strong wall, and, in lieu thereof, the Company have erected, and insist upon the plaintiff accepting such wooden staith, which stretches into the Humber eighty-four feet, at an average height of twenty feet from the mud, and which terminates in a single plank of the breadth of nine inches; and the Company have intimated to the plaintiff that this is the only substitute which they mean to erect and furnish to him in lieu of his present wharf, of the use of which they are proceeding to deprive him; and, having erected such substituted staith or jetty, they are rapidly proceeding to fill up the excavated bed of the railway in front of the wharf, and will shortly entirely shut out the water of the Humber from approaching any part of the wharf, and will render the wharf entirely useless. [The bill then stated certain letters between the solicitors of the plaintiff and of the Company; the former insisting that the Company were bound, before proceeding with the works, to make for the plaintiff a wharf equally suitable and convenient with his present one;—that the damages awarded by the jury were not for the total loss of the wharf, but on the supposition of a new wharf being provided for him; the latter insisting that part of the damages awarded was expressly for damage to the wharf or quay, and was founded on the production of a model shewing a new wharf or frontage as about to be constructed by the Company.]

The bill charged, that the claim of the plaintiff before the jury, and the verdict then given, were upon the assumption that the Company were bound and intended to construct for the plaintiff another wharf or quay, in compliance with the 69th section of the act;

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and that the attention of the jury was particularly called to those circumstances by the Company; and that the plaintiff received compensation only for the inconvenience and additional expense in labour which he would be put to, by reason of the different situation of the new wharf or quay, though on the supposition that the same would be equally large and substantial; and, as evidence thereof, the bill further charged, that in one of the plans produced to the jury, on behalf of the plaintiff, during the inquiry, a certain portion of the foreshore lying in front of the wharf and beyond the line of the railway, being equal in extent to the area of the present wharf, was delineated as the proposed site of a new wharf to be erected by the Company.

That, even if a wharf were erected upon the site, and in the manner shewn by the last-mentioned plan, such new wharf would be much less convenient than the present wharf, inasmuch as it would be further distant by ninety feet from the plaintiff's works, and would extend into the tideway or current of the river, so as to occasion great risk, delay, and additional labour in loading and unloading vessels, with increased risk of breakage, and greater cost in respect of freight and demurrage; and it was in respect of the several particulars of inconvenience, loss, and damage, that the plaintiff claimed compensation for the injury to his wharf before the jury.

That it was the understanding and agreement between the plaintiff and the promoters of the act, upon the faith of which the plaintiff's opposition was withdrawn, that a wharf, as nearly equal in point of convenience to the present wharf as the place would admit of, should be made; and that, until the same should be made and provided, the Company should not in any manner impede or interfere with the use and enjoyment of the present wharf.

The bill prayed, that the Company might be restrained from proceeding with the works so commenced by them in front of the plaintiff's wharf, and from commencing or pro-

secuting any other works, or doing any other act, matter, or thing, which should render the wharf of the plaintiff inconvenient for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, until the Company should, at their own expense, have caused another good and sufficient wharf to be set out and made instead thereof, as convenient for transporting, conveying, landing, shipping, or depositing of goods or merchandize as the present wharf, or as near thereto as may be; and might also, in the meantime, be in like manner restrained from permitting to continue in front of the wharf the deposits made by them for the purpose of their works, or any obstruction whatsoever made or caused by them. And for further relief.

On the 30th July, 1839, upon affidavits of the plaintiff and other persons verifying the several facts and documents stated in the bill, the plaintiffs obtained an injunction restraining the Company from proceeding with the works so commenced by them, as in the plaintiff's bill mentioned, in front of the plaintiff's present wharf, and from commencing or prosecuting any other works, or doing any other act, matter, or thing, which should render the wharf of the plaintiff inconvenient for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, until they, the Company, should, at their own expense, have caused another good and sufficient wharf to be set out and made instead thereof, as convenient for transporting, conveying, landing, shipping, or depositing of goods or merchandize as the plaintiff's present wharf, or as near thereto as may be, until the defendants should fully answer the plaintiff's bill, or the Court make other order to the contrary.

[The Company had entered an appearance to the bill. Mr. *Knight Bruce*, with whom was Mr. *Bethell*, on moving for the injunction *ex parte*, stated that fact to the

An injunction may be granted *ex parte*, notwithstanding

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Court. His Honor the Vice-Chancellor granted the injunction. See *Aller v. Jones* (a), *Harrison v. Cockerill* (b) *Acraman v. The Bristol Dock Company* (c), *Collard v. Cooper* (d), *Perry v. Weller* (e), *Petley v. The Eastern Counties Railway Company* (f), *Randall v. The Commercial Railway Company* (g).]

The Company filed affidavits in support of the motion to dissolve the injunction, thereby stating, to the effect that, in the year 1834, two distinct lines of railway were projected; the present, and another line which would have avoided the plaintiff's wharf and premises. That the plaintiff, by letter to the promoters, offered to take shares in the Company, to the amount of £1000, on condition that the present line was selected. That, after the letter of Mr. Broadley had been given to him, the plaintiff had opposed the passing of the bill in the House of Lords. That, on the occasion of the jury being impanelled to assess the value of the land or foreshore in front of the plaintiff's wharf, two models (h) were produced to the jury,—the one shewing the shore of the Humber, and the houses and buildings as then existing; and the other as the same will be when the railway is completed. That, on the last-mentioned model, there is shewn a jetty-quay, or landing or shipping place for goods, opposite to the pottery of the plaintiff, of the width, in scale, of forty-four feet. That it was never mentioned during the inquisition, that the Company were to build outside the railway a new wharf of the same dimensions as the present wharf, but that the compensation awarded by the verdict of the jury was calculated and given on the understanding that a communication with the Humber would be made

(a) 15 Ves. 605.

(b) 3 Mer. 1.

(c) 1 Russ. & My. 321.

(d) 6 Madd. 190.

(e) 3 Russ. 519.

(f) 8 Sim. 483.

(g) 8 Law Journ. Rep. (N. S.),
Chanc. 252.(h) These models were produced
in Court on the motion to dissolve
the injunction.

opposite to the pottery by a jetty-quay conformable to that shewn on the model, and that the damages to the plaintiff's pottery were assessed upon that ground. That the water of the Humber only flows up to the plaintiff's present wharf at high spring tides, and during the neap tides vessels are obliged to lay off at a considerable distance, and are loaded and unloaded by means of planks supported on moveable tressels. That it is the intention of the Company to make for the plaintiff a jetty-quay, in all respects conformable to that shewn on the model, of which intention the plaintiff had been apprized and was well aware at the time of filing his bill.

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The affidavits also set forth certain legal proceedings in the Court of Exchequer, relating to conflicting claims to the ownership of the foreshore in front of the plaintiff's wharf; and shewing that, on a special case, heard in that Court on the 5th of June, 1839, the Barons of the Exchequer unanimously gave their judgment in favour of a claim made by the Crown.

Affidavits in reply and in rejoinder were made (*a*).

The Company, on the 28th of November, 1839, gave notice of a motion to dissolve the injunction.

Mr. *Jacob*, Mr. *Stuart*, and Mr. *Sharpe*, for the motion.

Assuming the plaintiff to be the legal owner of the foreshore of the river, and forgetting that the Court of Exchequer has decided that the title to it is to be in the Crown, let us examine the nature and extent of the plaintiff's claim.

The plaintiff, adverting to the 69th section of the act, contends, that he is entitled to have made for him, on the

(*a*) Among the affidavits were some made by several of the jurymen, stating the different impressions on their minds as to the nature of the new wharf or quay,

and the consequent effect on their verdict. The Vice-Chancellor expressed his strong disapprobation of such attempted evidence.

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south side of the railway, a new wharf of equal area and dimensions to his present wharf. Now, to support such construction, the word "instead," in that section, must be read "in addition to," for the present wharf is not touched by the railway, and will therefore remain as heretofore for all the purposes of the deposit.

The proper mode of construing this clause is "reddendo singula singulis;" and it is not the wharf or actual place of deposit, but the communication leading to it that is injured. The wharf is not cut through, raised, sunk, or taken, or so much injured as to be impassable or inconvenient for transporting, conveying, landing, shipping, or depositing goods or merchandize, but the communication to it is injured; and therefore the Company must make a new communication within the terms of the 69th section.

The argument may be thus exemplified:—Suppose a road with another road leading into it,—the Company take the latter, not touching the former; the former road is in a sense rendered less convenient, because one of its points of ingress and egress is closed; still it never could successfully be contended, that the Company were bound to make a new road in lieu of the former. So, here, the plaintiff's wharf is not touched, but is only consequentially affected by the deprivation of one mode of access. It might equally well be argued, that a wharf or quay at any distance from the railway was similarly injured, if any collateral mode of approach were cut off.

If the plaintiff is right in his construction of the section, the Company are bound to make him a new wharf, and he will also retain his present wharf; but if his present wharf is to be retained, the Company are bound to make him a communication to it: he cannot be entitled to a new wharf and also to a communication to his present wharf.

[The *Vice-Chancellor*.—The present wharf has 140 feet frontage to the water; if there is to be a new communication with the wharf as good as the former, does it

not of necessity follow that the frontage of the new communication should be of equal extent to that of the former? Suppose a certain number of vessels, whose collective length might be 140 feet, could simultaneously be loaded and unloaded at the old wharf or old communication, would it be a compliance with the act if half only of that number could be accommodated at the same time at the new wharf or new communication ?]

The plaintiff has put his whole case upon the right to a new wharf of equal area and convenience with the present, and cannot recede from the terms of his injunction. If the Company are bound to make the new wharf, they must first complete the railway embankment. By the injunction they are prohibited from proceeding with what must be the foundation of the new wharf. It is not more reasonable than a command not to build the foundation of a house until the first story shall have been completed. A mandamus is the proper remedy. It is sworn in the affidavits, that the building of the wharf in the bed of the river would be a violation of the act of the 46 Geo. 3, c. 153, and an indictable offence. The Attorney-General is not before the Court. The plaintiff has received damages by the award of a jury, on the supposition that he was to have a jetty made for him, as shewn on the Company's models.

Another ground for dissolving the injunction is, that there has been misrepresentation and concealment on the part of the plaintiff in the obtaining of the injunction. He has stated an absolute title in himself to the foreshore; he has suppressed the fact of his opposition to the bill in the House of Lords; he has sworn that the temporary staith was all the communication with the river which the Company proposed to give to him; and has asserted, in unqualified terms, that vessels could lay alongside his wharf, when it is distinctly proved that they could only do so at high spring

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tides. He has also concealed the fact of the models being before the jury at the time of the inquisition.

Mr. *Knight Bruce* and Mr. *Bethell*, in support of the injunction.

[The *Vice-Chancellor* relieved the counsel from the point as to the injunction having been obtained by concealment or misrepresentation of facts.]

The question is one of mere law, depending on the construction of an act of Parliament, which can only be ascertained by resorting to a Court of Law. The duty of this Court is to put the question in a course for a speedy and conclusive determination by the proper tribunal, and, in the meantime, to preserve, by its injunction, the subject-matter in dispute. *Kemp v. The London and Brighton Railway Company* (a).

The legal question in the present case undoubtedly presents a more complicated mixture of law and fact than did the case of Mr. *Kemp*; for here much subtle argument may be raised in the definition of the words “wharf” and “communication;” but *Blakemore v. The Glamorganshire Canal Company* (b) has provided for that difficulty. In that case Lord Eldon himself penned the issues to be tried, with a view to such a difficulty there, and directed the whole case, both of fact and of law, to be submitted to the jury, with liberty to the parties to come back to him, if dissatisfied with the verdict on the legal point.

A water frontage is of the vital essence of a “wharf;” the diverting or obstructing the flow of water to that frontage is, in the most strict literal meaning of the 69th section, “a taking” of a wharf for the purposes of the act. The word “injured” puts the question beyond dispute.

(a) *Ante*, p. 495.

(b) 1 My. & K. 154.

It is said that the jury assessed the damages on the supposition that the plaintiff was to have nothing more than was shewn on the models. That was a point with which the jury had nothing to do, and as to which they could give no opinion or verdict. The right of the plaintiff arises under the act; the 69th section contains an absolute prohibition against taking a certain thing until an equally convenient substitute be provided. The jury had to assess the amount of compensation for things for which the act has provided that pecuniary compensation should be given; but the 69th section contains a qualification of all previous sections; and enacts, that for certain things therein specified, substitution in specie, and not by pecuniary damages, shall be given; and pecuniary compensation being excluded, the subject was not within the province of the jury.

The verdict must have been given on the understanding that the 69th section would be complied with: the jury could not, and therefore it must be assumed did not attempt to, form any opinion as to the legal construction of that section.

The plaintiff has a possessory title of ten years, and he has a right to have that possession protected. The Court cannot now enter into the question of the legal title to the foreshore.

Mr. *Jacob*, in reply.—The material part of the equity adduced by the bill is, that the inquiry before the jury was upon the footing and assumption that the Company were bound and intended to make a new wharf equally large and substantial with the present one; that part of the assumed equity fails, if it is now said there is no such understanding.

The 10th section of the act contemplates a physical dealing with land, and confers the power of doing what otherwise would amount to trespass. The powers spoken of in the 69th section have reference to the power of tan-

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gible interference with property given by the 10th section. The word “injured,” used in the 69th section, means direct manual, not indirect or consequential, injury; were it otherwise, the owner of a tavern or public-house would have a cause of suit or action against the Company, in respect of the house of any customer which was pulled down by them. The plaintiff’s wharf, therefore, is not “injured” within the meaning of the 69th section.

The Court does not grant an injunction on the mere ground that there is a point to be tried at law. The Court grants or dissolves an injunction, pending a trial, according as it considers the legal question to turn in favour of the plaintiff or defendant. *The Attorney-General v. The London and Southampton Railway Company (a)*.

Dec. 10th. The VICE-CHANCELLOR.—The decision of this case is not void of difficulty. It is, however, the duty of the Court to put as fair a construction upon the words of any clause of an act of Parliament, which may come before it for discussion, as it can.

The 6th section of the act authorizes the Company to construct upon any lands, amongst other things, embankments. The Company, under that power, are proceeding to construct an embankment upon lands being the foreshore of the plaintiff’s wharf. The plaintiff alleges that thereby an injury will be done to him; and he relies on the 69th section. [His Honor read the section.] It seems to me, I confess, that whatever difficulty there may be about determining what is the real law upon the construction of the section as applied to this case, that, in fact, by making the railway in the manner proposed, the character of the wharf will necessarily be destroyed. I am taking a wharf

(a) 9 Sim. 78, *ante*, p. 302.

to be that which I have always understood a wharf to be,—a place for landing and shipping goods contiguous to the side of water by which goods may be brought by vessels.

It is quite obvious, that, though in this case the wharf itself be not touched, yet, that the interposition of a solid bank of earth, which would support the railway between what is now the wharf and the side of the water, will altogether take away the character of the wharf,—it must injure the wharf.

Now, supposing a different view to be taken, and it may be said that the wharf would remain for some purposes, although the communication with the water be injured, then, if that be the construction of the act, there is to be another communication made, which is to be as good as the former, or as near thereto as may be. Now, with reference to that communication, admitting, for the sake of argument, that there is not to be a new wharf of the same area and form as the plaintiff contends there should be, still, a question would arise as to what is “a communication as good as the former, or as near thereto as may be;” and a question might be very fairly raised, whether a mere jetty, only extending along the side of the water to a length of forty-four feet, would be a communication as good as formerly existed, when it was in the power of the Company to make the jetty commensurate with the whole length of the old wharf,—that is, 141 feet?

I certainly am not disposed myself to put an interpretation upon the 69th section. It really appears to me to be a very fit question for determination by a Court of law; the question now is, what is to be done in the meantime?

Now the right of the plaintiff under the act is this:—before any injury is done to the wharf, *quà* wharf, or to the communication, as mere communication to the wharf, to have, in the language of the statute, another wharf, or another communication, made in lieu thereof as convenient as the former one, or as near thereto as may be.

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If this Court should allow the Company to complete their railway in front of the plaintiff's wharf without interfering,—then, although it might ultimately be determined that the plaintiff had once the right to say to the Company, “You shall proceed no further, until you have made me as good a wharf, or as good a communication as I had before,” yet this Court would no longer have the power of giving relief. I do not think that, in a case where there may be absolute irremediable mischief, this Court is in the habit of saying, that because the question is doubtful the Court will not interpose, but will let a defendant do what he pleases, although it may ultimately turn out that what he proposes to do is directly contrary to the words and meaning of the act of Parliament. It seems, therefore, to me that it is quite impossible to dissolve this injunction.

Whether it be possible to introduce any qualification, or so to word the injunction as to have the effect of allowing the Company to carry on their works in such a manner as that what they may do shall only be in furtherance of the object which the plaintiff has in view, is another point. That, I think, deserves some consideration; and I certainly am inclined to think that the right course to take would be, if it can be done, to modify the injunction, so as to restrain the Company from completing their works, but, at the same time, not to interfere with their doing those things, which, as I understand it, must ultimately be done, even in the plaintiff's own view of the case; because, supposing the plaintiff to be right in asserting that he is entitled to have an entire new wharf—upon which claim I give no opinion,—it is quite obvious that a mere wharf in the abstract, separated from the land, would not answer his purpose; there must, in that view of the case, be a communication between the new and the old wharf; and, therefore, putting the case upon the question of communication only, there must be something done besides merely making that outside jetty, which, to some extent, the

Company admit they are bound to make; and, therefore, it seems to me, that, in any view of the case, it would be right to modify the injunction, so as to allow some portion of the intermediate work, which is to connect the southern end of the plaintiff's old wharf with what will be his new wharf or new communication, to be carried into effect.

It also appears to me to be right to put this case in a course of legal trial; and I think the right mode will be to direct the plaintiff to bring an action. There will be three questions to be tried—first, whether the plaintiff is entitled to have a wharf?—secondly, supposing it should be held that he is not entitled to have a wharf, but only a communication, whether he is entitled to a communication to the extent, not of forty-four feet only, but of 141 feet?—thirdly, supposing him not entitled to a communication to the extent of 141 feet, whether a communication of forty-four feet would be sufficient? It seems to me that these questions might be tried by an action, on admissions.

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The VICE-CHANCELLOR.—In this case, I propose that the injunction shall stand as at present, adding after the word “contrary” (p. 623, line 32):—“But this is to be without prejudice to the Company carrying on and completing such parts of the works so commenced by them as may be necessary for making such other good and sufficient wharf as aforesaid.”

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Let the plaintiff bring such action or actions, as he may be advised, against the Company, for the purpose of determining whether he is entitled to have made for him such other wharf as aforesaid; and, on the trial of such action or actions, let it be admitted that the Company have made such jetty as is represented in their model, and reserve the further consideration of the motion and the costs thereof, and either party to be at liberty to apply.

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The Company appealed.

Mr. *Jacob*, Mr. *Stuart*, and Mr. *Sharpe*, in support of the appeal.

In addition to the arguments urged in the Court below, it was contended, on the part of the Company, that the order directing the action at law was erroneous, inasmuch as there was no question of fact to be tried. That the admissions directed had no application to the case made by the bill,—and that the proper mode of trial was by directing a case for the opinion of a Court of law; that if an action were directed to be brought, the nature of the action and the mode of trial ought to have been specified in the order.

On behalf of the Company an offer was made to pay a sum of money into Court, either as a better guarantee for the conduct of the Company, if that should be thought necessary, or as a security to the plaintiff, if the injunction should be dissolved.

Mr. *Knight Bruce* and Mr. *Bethell*, *contra*, were not required to address the Court.

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The LORD CHANCELLOR.—It appears to me that the facts of this case lie in the narrowest possible compass, and, as far as appears to me to be material to the case, they may be stated in a very few sentences. The plaintiff is entitled to certain premises, consisting of a wharf, which did abut upon the river Humber, and was accessible at high tide, without any intermediate accommodation for the transit of goods from the ships to the wharf,—at other times requiring a stage of wood from the ships to the wharf. The defendants obtain an act of Parliament, authorizing them to carry a

railway between these premises and the water, or rather, I presume, upon the piece of ground which was part of the water-way, at high tide at least,—for it projects beyond the plaintiff's wharf at low water, and was contiguous to it at high tide; and they obtain a clause in the act of Parliament (the 69th clause), upon which the question arises, whether they have so injured the plaintiff's wharf as to entitle him to require from them another wharf to be made instead of it?

Now, it is true, I am not to grant an injunction merely because a legal question is raised as to the right and power of the Company, or the necessity of making a new wharf; and if I thought that that was so clear for the defendants that I entertained a very strong opinion in their favour and against the plaintiff, I should not consider the plaintiff was entitled to an injunction; but, on the other hand, if I see a very grave question,—and, without saying to what extent my opinion goes, it goes, at least, to this extent,—that it is very far from being clearly my opinion that the defendants are right; and it is very proper to put the matter into a course of inquiry at law,—being merely a legal question,—in order to ascertain what the rights of the parties are. Now, that is all the Vice-Chancellor has done. He has directed an action to be brought which, it appears to me, will very properly raise the question between the parties; because we know what the Company say they intend to do by the model they have produced; and we know what the plaintiff says they ought to do by the plan which he has produced. The action is to enable the plaintiff, if he can, to satisfy a Court of law (and that is the only advantage arising from an action or an issue, and by the decision of which this Court will ultimately be regulated as to the question of law) he has a right to that which he claims; namely, to have a new wharf instead of that which he says has been so much injured as to be unfit for the purposes of a wharf. That is the object with which the Vice-Chan-

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cellor has directed the action to be brought. It is in the ordinary course. It goes even further. The order is more specific than in general cases; it not only directs that an action should be brought, which would of itself make it incumbent on the plaintiff so to frame his action as to try his right, but it describes the particular question the Court thinks it proper to have ascertained.

The only question is, whether the injunction shall be continued in the meantime? Why, the object of the action is merely for the purpose of disposing of the injunction. This Court would have nothing to do with the action if it were not for the injunction; and the action is for the purpose of ascertaining whether it be a case in which the injunction ought to be maintained or dissolved.

Now, I do not assent to the proposition that this Court will let a defendant go on with his works, trusting to what he will hereafter do, unless it be very clear that the Court has the power to compel him to do it; because it is nothing to say that the defendants have done all the injury they intended to do. They have no right to do anything: they have no right to commence or finish anything, if the construction of the act is against them. If the construction of the act is for them, of course they have a right to do it; but if the construction of the act is against them, they have no right to do anything without putting the plaintiff in the situation in which the 69th clause entitles him to be placed. Until that is done, they have no right to proceed to any extent; and this Court would stop them at any period when application was made to the Court.

It is very necessary, I think, and I have had reason to have ample experience on that subject, that this Court should deal very strictly with these Companies, and prevent them, with the large powers that are given to them by acts of Parliament, from defeating the rights and interests of individuals. But it is also the duty of the Court to take care, that if individuals avail themselves of any omission of

any power on the part of the Company, this Court should not assist those individuals in extorting money from the Company. It is the duty of the Court in every case to steer clear of those two opposite extremes; and if there should be some omission, which may give a party a legal right against a Company, the Court would leave that individual to his legal means of taking advantage of it. But it is not necessary in this case for me to consider that question; I notice it merely because it has been thrown out in argument, and it is very necessary that that should be clearly understood.

Notwithstanding, therefore, I am of opinion that, under the 69th clause, there is ample ground for retaining the injunction, and supporting the order the Vice-Chancellor has made, and that the action must be directed to be brought to trial before the Court can finally adjudicate upon the question of right, I am also of opinion, that the Court will require the action to be tried as soon as possible, in order that this may not be kept in litigation any longer than is absolutely necessary.

And I may also state, not upon any point which now arises before me, but merely for the guidance of the parties, that if the application is made to me, and I can clearly see that I can secure all the benefit to the plaintiff that he is entitled to, without inflicting so much injury on the defendants as to continue the injunction, without forming any opinion as to the point that may then be brought before me, I shall be very ready and willing to listen to any application for that purpose. At present, I have no evidence to shew that any injury is sustained by the Company by the postponement of these works, nor any means suggested by which I can be quite sure that I shall not, in permitting them to go on, subject the plaintiff to inconvenience and danger, and which I must be satisfied of before I can interfere to disturb that which I am satisfied is his equitable right at present; namely, to restrain the Company from going on

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with the works, until it is ascertained they are entitled to do so.

Now, with regard to what took place when the *ex parte* injunction was granted, I have no reason to depart from what I have before stated with respect to parties applying for and obtaining injunctions *ex parte*, which would not have been granted if there had been more accurate statements of the case made; but I do not think that this case is one to which that rule can with anything like justice be applied. There is nothing stated here, except what is alleged about the agreement, as to which it is not necessary to raise the question; because I am satisfied the Vice-Chancellor was quite aware that the question between the parties was, whether there was to be a new wharf or not, and not the communication between the old wharf and the water-way. It is stated that the affidavits represent something of an agreement or understanding to have taken place. The plaintiff has set out the letter which he received, and which he regarded as constituting the agreement; and I must say that that letter was extremely well calculated,—I will not say that it was intended to do so, but it was very well calculated to,—and the facts stated on both sides shew that it did, mislead the plaintiff; because, on the receipt of this letter, he went away. It was not at all unnatural, I think, to put a very different construction on that letter than that which was intended by the party who wrote it.

But the grounds on which I think it unnecessary to go further into the investigation of that point are these:—the *ex parte* order was made before the end of the month of July; and it was immediately served upon the defendants. The defendants, of course, then had access to the affidavits; and no complaint is made until the end of the month of November. It was their business to see the grounds upon which the injunction was obtained, and the whole of the long vacation, during which it is well known the Courts are open—at least, the Judges of the Court—to applications of

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this sort, the whole of that interval, the long vacation, passes away, and no application is made to disturb the order upon that ground, which must have been apparent the moment the attorney saw the affidavits; and the Vice-Chancellor having, upon an application to dissolve the injunction, made this order, no application is made to me until this day,—until notice is given of this motion to set right what the defendants alleged was wrong in the view the Vice-Chancellor took of the case. However important it may be to protect defendants against *ex parte* injunctions, it does appear to me to be very important also that those objections which are apparent should be made in proper time, and that the party should bring the complaint he has to make before the Court as soon as he can.

There is another reason why it appears to me unnecessary to go into that part of the case, and which is this, that the Vice-Chancellor has not disposed of it. It could only be a question of costs; and the Vice-Chancellor has reserved the costs. Upon the motion to dissolve the injunction, the Vice-Chancellor varied the order, and, as I understand, reserved all the costs. It will be quite competent, therefore, hereafter for the defendants to shew, if they can, upon that question of costs, that there was an improper representation made to the Vice-Chancellor, on which the *ex parte* injunction was granted; and if the Court should be of that opinion, after all that may take place upon the inquiry, it will be quite competent for the Court to set the party right as to any additional costs which have been sustained by what is alleged to have been a false representation of the state of the case when the injunction was applied for.

That is one of the grounds; it is not the principal ground, it does not involve the question of merit, but one of the grounds on which, I think, this application cannot be supported, and is one which must be refused with costs; but when I do so, I think it right to hold out to the

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parties that I shall be ready to hear any proposition of arrangement which may be beneficial to them, so that it does not interfere with the trial of the rights between them.

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Nov. 21st.

1840.

May 1st.

Between ROBERT PLAYFAIR, - - - Plaintiff,
and

THE BIRMINGHAM, BRISTOL, and THAMES
JUNCTION RAILWAY COMPANY, and
JOHN THOMPSON, - - - Defendants.

A Railway Act empowered the Company to make calls upon the shares, and, in case of non-payment, to sue the proprietor, or to declare the shares to be forfeited, prescribing certain formalities to be observed in the declaration of such forfeiture. The act also allowed an owner of shares, not in arrear for calls, to sell and transfer his shares with certain formalities; and it authorized the Company to buy up shares offered for sale.

THE bill stated an act of Parliament, passed in the 5 Geo. 4, establishing the Kensington Canal Company with power to make and maintain a navigable canal from or near Counter's Bridge, on the road from London to Hammersmith, to the river Thames. That the canal was made, but was wholly unprofitable, and the shares became of little or no value, and were unsaleable. That, in August, 1835, some of the proprietors of the Company set on foot a scheme for making a railway to connect the Kensington Canal with the London and Birmingham Railway, and the Great Western Railway. That, in December, 1835, the plaintiff was induced to subscribe for forty shares in the intended Railway Company, on which he paid the

transfer his shares with certain formalities; and it authorized the Company to buy up shares offered for sale. The plaintiff, a registered proprietor of one hundred shares, and a director of the Company, offered to the other directors to forfeit and relinquish his shares; the directors accepted the offer, and a deed was prepared for the purpose by the solicitors of the Company, and was executed by the plaintiff. None of the formalities required by the act for the forfeiture or sale and transfer of shares, were complied with. In August, 1837, the plaintiff ceased to be a director of the Company. In the same month, a call was made on the shareholders of the Company; and in May, 1838, a subsequent call was made. In August, 1838, the Company required the plaintiff to pay the whole of the calls on his shares; and, on his default to do so, they, in December, 1838, commenced an action at law against him for the amount of such calls.

The plaintiff filed his bill, and obtained the common injunction, which was extended to stay trial of the action. The Company obtained the order nisi to dissolve, on putting in their answer. Upon cause being shewn, the Vice-Chancellor continued the injunction.

Held, by the Lord Chancellor, that the Court cannot, upon an alleged equity, interfere with an admitted legal right, unless there be a manifest certainty that, at the hearing of the cause, the plaintiff will be entitled to relief. That the title to relief in this case was not so clear as to justify the Court in continuing the injunction, except upon the terms of the plaintiff giving judgment in the action, and paying the amount sued for into Court.

deposit of £1 per share, and he was nominated a member of the Provisional Committee, and attended several of its meetings. That, at a meeting of the Provisional Committee, held in March, 1836, it was represented that, in order to conform to a standing order of the House of Lords, namely, that four-fifths of the probable expense of such works should be contracted for before any bill for such a purpose should be read a third time, it was necessary to appropriate certain reserved shares in the intended Company; and, in consequence of such representation, the plaintiff, and all or most of the Provisional Committee, subscribed for one hundred shares in the said Company. That, for the like purpose, fifteen or twenty shares a-piece were further allotted to the members of the Provisional Committee at a meeting thereof, held in April, 1836. That the bill received the royal assent on the 21st of June, 1836, and became an act of the 6 & 7 Will. 4, intituled "An Act for making a Railway from the Basin of the Kensington Canal, at Kensington, to join the London and Birmingham and Great Western Railways, at or near Holsden Green, in the County of Middlesex, to be called the Birmingham, Bristol, and Thames Junction Railway." The bill then stated the 3rd section of the act, empowering the Company to raise money by shares; the 5th section, by which the Company were enabled to make and maintain the railway; the 6th, empowering the Company to purchase the Kensington Canal; the 98th, enacting that half-yearly general meetings of the Company should be held in February and August in every year; the 104th, specifying what subscribers should be entitled to vote at such meetings; the 107th, enacting that no director or proprietor should act or vote in such capacity after the day for payment of the calls, who had not paid up the money called for in respect of his shares; the 108th, conferring the powers of the general and special general meetings; the 110th, 111th, and 114th sections, relating to the election and

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qualification of directors; the 115th, prescribing the powers of the directors; the 118th, providing for the entry in the books of the Company of all orders and proceedings of the directors and proprietors at their meetings, and rendering the same legal evidence; the 125th and 127th, enacting that a register of the proprietors, and the amount of their subscriptions, and the number of their shares should be made and kept; the 129th, enacting that the present and future subscribers should pay the sums of money subscribed for from time to time as the same should be called for by the directors, and empowering the latter to sue for the same, if they should not be paid; the 130th, empowering the directors to make calls, and if the amount of the same was not paid, with interest from the day appointed, either to sue for the same, or declare the shares to be forfeited, by notice to the owner,—such declaration of forfeiture being subject to confirmation by a general or special general meeting, held after three months from the time of the notice; and also empowering the directors then to sell or dispose of the forfeited shares; and enacting that a declaration of the facts of the forfeiture before a justice of the peace or Master in Chancery, and the receipt of the treasurer for the price, should be evidence of the purchaser's title; the 131st and 132nd, as to the application of the surplus purchase-money of forfeited shares, and the declaration and evidence in actions for calls; the 135th and 136th, enabling the proprietors, not in arrear for their calls, to sell their shares; providing for the mode of transfer; and specifying the time when the title and liability should be transferred; and the 147th, enabling the Company to buy up shares offered for sale. The bill also stated that the plaintiff applied to be registered as the proprietor of forty shares; and that he was induced to be registered for the one hundred shares, by the representation of the secretary, that he might sell them at any time; and that the common seal of the Company was affixed to

the register at the first general meeting of the Company. That certain sums were voted to the Provisional Committee, and which they applied to the purchase of unregistered shares. That a call of £2 per share was made in August, 1836. That, at a meeting of the directors, in March, 1837, the plaintiff stated that he was willing to pay the call as to the forty shares, but not as to the one hundred, which he had taken on the representation that he should not be in a worse position by so doing. That, at a subsequent meeting of the directors, it was resolved (the plaintiff having withdrawn during the discussion) that the plaintiff and another of the directors should be at liberty, at their own expense, to transfer to the Company all their interest in the shares taken by them for the accommodation of the Company; and a special memorandum or minute in writing to that effect was directed to be prepared and entered on the proceedings of the meeting; and the solicitors of the Company were ordered to prepare the necessary deed. That the plaintiff wished to relinquish 135 of his shares; but the secretary represented to him that the resolution extended to the one hundred shares only. That the plaintiff, on the 14th of March, 1837, executed a deed-poll, being a release or transfer of the one hundred shares, to the Company, thereby forfeiting and relinquishing the same and the deposits paid thereon, and he delivered up to the secretary the scrip certificates of such shares. That, in the register to which the seal of the Company was affixed, at the general meeting in March, 1837, the plaintiff's name appeared as the proprietor of forty shares only. That, in April, 1837, the plaintiff sold twenty of his remaining shares to A. Playfair, who was received as a proprietor thereof by the Company; and, in May, 1837, another call of £1 per share was made, which the plaintiff paid. That, in August, 1837, he sold the remaining twenty shares to W. Jenkins, who was in like manner received as a proprietor, and the plaintiff did not afterwards interfere

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in the Company. That a third call of £2 per share was made in August, 1837; and a fourth call of £3 per share in May, 1838. That, in August, 1838, an application was made to the plaintiff to adopt the forty shares, on the ground that the same had been transferred to irresponsible persons; but no claim was made on him in respect of the one hundred shares, until September, 1838, when he was informed by the secretary, that the last general meeting of the Company had resolved not to confirm the declaration of forfeiture thereof; and he was then called upon to pay the deposits in respect thereof, and the interest thereon, amounting altogether to the sum of £800 and upwards. That, in December, 1838, the Company commenced an action to recover from the plaintiff the sum of £1000 for five calls on the one hundred shares, and £320 for three calls on the forty shares, together with interest thereon respectively. After several charges, with respect to matters evidencing the fact that the plaintiff had, after his release of the one hundred shares, been uniformly treated and considered by the Company as not being the proprietor thereof, the bill prayed that the Railway Company and J. Thompson, their secretary, might answer the premises; and that the Company might be decreed to execute to the plaintiff a good and sufficient release in the law of all claims and demands for or in respect of the amount theretofore called for or thereafter to be called for under the authority of the said act of 6 Will. 4, upon the one hundred shares in the undertaking, specified in the deed-poll of the 14th of March, 1837, and from all other claims and demands in respect of the same one hundred shares; and that the Company might be restrained from further proceeding in the action commenced by them against the plaintiff, and from commencing any other action at law against the plaintiff, to recover the amount theretofore called for, under the authority of the act, upon the one hundred shares in the undertaking specified in the said deed-poll; and that the

defendant J. Thompson might make a full and true discovery of all and every the matters thereinbefore mentioned. And for further relief.

The common injunction was obtained for want of an answer, and was extended to stay trial on the usual affidavit.

The Company and J. Thompson put in their joint and several answers on the 6th of August, 1839.

The answer admitted that certificate tickets, under the 125th section of the act, were delivered to the plaintiff of the forty, but not of the one hundred shares. It stated, that, at the meeting of the directors on the 1st of March, 1837, the following resolution was passed:—"The after-mentioned shares having been tendered by the proprietor to be forfeited, namely, one hundred shares, numbered 3418 to 3517, inclusive, it was moved, seconded, and resolved, that the Company accept the same for that purpose; and that an instrument be prepared, at the expense of the proprietor, releasing his whole interest in the same, without requiring the formalities prescribed by the 130th section of the Company's act of Parliament, and waiving all right or remedy under such section." The answer then admitted that the solicitors of the Company were thereupon directed to prepare the necessary deed to carry the resolution into effect. It admitted the execution of the deed of the 14th of March, 1837, and the delivery up of the scrip certificates; and that no claim was made upon the plaintiff in respect of the third and fourth calls, until the 20th of August, 1838, and no claim was made upon him in respect of the one hundred shares, until the 7th of September, 1838. It admitted the commencement of the action on the 8th of December, 1838, and the declaration therein on the 8th of January, 1839. It denied that any agreement had been made by the directors with the plaintiff in regard to the one hundred shares, and averred that nothing passed,

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except the tender of the same to be forfeited on behalf of the plaintiff, and the said resolution of the directors thereon; and submitted that the directors were not empowered by the act to bind the Company to the performance of any agreement of relinquishment, and that, under the circumstances, the Company were not bound; and that at none of the subsequent half-yearly general meetings had the arrangement between the plaintiff and the directors been confirmed; and that, in fact, at the half-yearly general meeting, held on the 15th of August, 1838, the resolution of the 1st of March, declaring the shares to be forfeited, was refused confirmation. It admitted that, after the plaintiff had transferred his last twenty shares, certain half-yearly general meetings of the Company were held, and that, at each of such meetings, a register of proprietors of shares in the undertaking was produced, and sealed with the seal of the Company; and that, under the circumstances, no notice of any such calls was sent to the plaintiff, and no demand made upon him in respect thereof, until the time above mentioned; and that the plaintiff had not been in any manner treated as a proprietor of shares from the month of August, 1837, until the month of August, 1838.

Upon the answer being filed, the order *nisi* for dissolving the injunction was obtained.

Nov. 21st.

Mr. *K. Bruce*, Mr. *Jacob*, Mr. *C. C. Barber*, and Mr. *Ogle*, appeared to shew cause against dissolving the injunction.

The plaintiff has no valid defence at law to this action; the liability which he has incurred can only be got rid of in a Court of law by the formal release which the act has provided, or by the shares having been forfeited, in which case all the preliminary steps, which the act enjoins previous to a legal forfeiture, must be proved to have taken place.

The directors have power to bind the Company as a corporation by contracts or instruments not under seal. *Beverley v. The Lincoln Gas Light Company* (a), *Church v. Imperial Gas Company* (b). The directors have the power, under the act of Parliament, of purchasing shares; and, having authority to affix their common seal to a contract or instrument, the mere absence of that formality is not an objection in a Court of equity. *Marshall v. Corporation of Queenborough* (c); *Wilmot v. Corporation of Coventry* (d).

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Mr. G. Richards and Mr. L. Wigram, for making the order nisi absolute.—This is purely a question of law. The Company are empowered, and in order to complete their undertaking, are bound to sue for calls due from proprietors of shares. They have, therefore, a right to proceed to trial upon the question of the plaintiff's liability. He insists that, owing to something which has taken place, he has been discharged from that liability; the circumstance relied upon as having that effect, either was or was not within the exercise of the lawful powers of the directors. In the former case, the plaintiff has a sufficient defence at law,—in the latter case, equity will not interfere against the Company. There is no foundation for any equity as arising out of an agreement unperformed; for it is evident that nothing was agreed to be done which has not in fact been done; the plaintiff has all which was agreed to be given to him, and he must be left to its legal effect.

The VICE-CHANCELLOR.—The difficulty I feel is this—it never could have been the meaning of the parties, that the plaintiff should give up his £100 and his one hundred

(a) 6 Adol. & Ell. 829.

(c) 1 S. & S. 520.

(b) Id. 846.

(d) 1 You. & C. 518.

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shares, including the chance of any future profits, and all the rights he might further have the power of exercising as the owner of that number of shares, and yet remain liable to answer all the calls of the Company. This could not have been the meaning of the parties. The resolution is, [his Honor read the resolution of the 1st of March, 1837]. It appears to me that they did not mean that the transaction should proceed on the 130th section of the act, which, as I understand the mode to be pursued, would be this:—The directors would first declare the shares to be forfeited, and then the Legislature provides certain other forms [reads the 130th section]. As I understand the meaning of the parties, the shares were not to be given up under the 130th section, but by some instrument to be prepared by the solicitors of the Company for the purpose, and which was to have the effect of vesting the shares to be so given up in the Company, so as to enable them to resell those shares. It is quite as inconsistent to suppose that the Company were to take the shares without the immediate power of selling them, as that the plaintiff was to be liable to the future calls on those shares without the chance of the future profits. I cannot think that such could be the meaning of that which is imperfectly expressed in the resolution. The solicitors of the Company prepared an instrument, which I do not think conveyed the real meaning [his Honor read the deed-poll]. In this instrument, there is first the expression of “forfeiting;” then follow words of general release; nothing turns on them: then come these words:—“The Company have agreed to accept a surrender, forfeiture, and relinquishment of the shares.” When the Company accept this deed, and make payment of a fractional sum to the plaintiff for his services as a director up to the time when he sold his forty shares, they must have considered him as having ceased to be a shareholder in respect of these one

hundred shares. The thing has not been carried far enough by this instrument to effect what I take to have been the real intention of the parties. I am so strongly of this opinion, that I shall direct the injunction to be continued, to restrain the action on the one hundred shares. As to the forty shares, no case is made. Let the injunction be continued so as not to prevent the defendants from proceeding as they may be advised in their action with regard to the forty shares.

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The Company appealed.

Mr. *Wigram*, Mr. *Richards*, and Mr. *Loftus Wigram*, in support of the appeal motion.

Mr. *Jacob*, Mr. *Bethell*, Mr. *C. C. Barber*, and Mr. *Ogle*, in support of the order of the Vice-Chancellor.

THE LORD CHANCELLOR.—In cases of this kind, where the plaintiff alleges an equity, in order to interfere with an admitted legal right, it requires a very strong case indeed for the Court to stop the action by injunction. It is, in fact, adjudicating for the plaintiff upon the answer: the strongest possible decision, therefore, in favour of the plaintiff—not requiring the plaintiff to prove anything the answer may not allege, but taking the plaintiff's own statement in his favour. There are cases no doubt, in which it is right to do that; but they must be cases free from all possibility of doubt, where the Court clearly sees that, upon the suit coming on for hearing, the relief sought by the bill will be decreed. This is, in effect, assumed by the Vice-Chancellor's order; but I am not so sufficiently satisfied that the plaintiff will get the decree he asks, as to support that order. On the other hand, if the Court altogether refuses to interfere, it is destroying all

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chance of benefit which the plaintiff would have by getting a decree; because the plaintiff would come to a hearing, having lost the benefit of his equity, so far, at least, as his having been compelled in the meantime to part with his money goes, for that whether he can ever get it back or not, is another thing than having to discuss the matter with a defendant, either with the money in his possession, or in a position which will enable him to get it, if the decision be in his favour. I certainly have some doubt how far it is right for me to interfere to the extent to which I think I am bound to interfere; but I am very much influenced by what must have been the intention of the parties, and by the course which, as to time at least, has been since adopted.

It is quite clear that the intention of the plaintiff, when he gave up his shares, was to be protected against the calls: he could not possibly have any other motive than to avoid the liability arising from the demand for calls. Now, whatever doubt there may be as to the power of the directors to do that which they in fact did, there is no doubt that, supposing the whole transaction to be fair,—not open to any objection on the ground of any improper leaning in favour of a co-director,—that the act furnished the mode by which, in giving up his shares, he might have been protected from his liability to the calls; for, if the provisions of the act as to forfeiting of shares had been followed, the desired effect would have been produced. It certainly does not appear to have been a contract for purchase of the shares; it was not so treated,—nor were the provisions of the act as to the forfeiture of shares complied with. It seems to have been a sort of middle transaction, partaking in some degree of the nature of both, but a proceeding which certainly is not contemplated in the provisions of the act. Those persons, however, with whom the plaintiff was dealing, must be supposed to have intended, in taking the shares, to give the plaintiff the

benefit of what the act provides as a forfeiture. The reference to the 130th section,—the section providing for forfeiture of shares,—clearly shews that the resolution was intended to relieve the plaintiff, and to obtain for the Company the benefit which the same section provides for them in that event. That course, however, was not adopted.

One question to be decided when the cause comes to a hearing will be, whether the directors had power to do what they have done; and if so, whether an equity exists as against the Company to carry into effect what must be supposed to have been the intention of the Company? Although every thing contracted to be done has been done, it has not produced the effect contemplated by the parties to the transaction; because the only stipulation was the giving up, relinquishment, and release, by the plaintiff,—nothing was required to be done on the part of the directors. This is a question which is only to be decided when the cause comes to a hearing, and I only use it for the present purpose, to shew that it was not a matter of doubt that the result of the transaction was intended to be the protection of the plaintiff against performing that which he is now called upon to perform. Great difficulty no doubt exists, as to how that expectation is to be realized as against the Company. The transaction took place in March, 1837. Now, so long as the plaintiff remained a director, I do not think that any presumption can fairly be raised against the Company arising out of what did or did not take place; but in August, 1837, he ceased to be a director. In the same month of August—whether before or after he ceased to be a director, I am not quite sure—one of the calls was made; in May, 1838, another call was made. It does not appear that the action was brought until December, 1838; a very considerable interval of time after the defendant ceased to be a director, as well as after those calls which I have alluded to. It is plain, then, that there was very

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great delay on the part of the Company in making this demand; and when, in December, 1838, the action was brought, this bill was filed. The period to which I particularly advert is from August, 1837, when the Company, relieved from whatever pressure might exist from the fact of the plaintiff being one of the directors, had the full opportunity of asserting whatever rights they had a title to assert against the plaintiff in regard to those calls: nothing, however, is done until December, 1838. Whether this amounts to a confirmation, is a matter to be considered hereafter; but certainly it is a sort of acquiescence in the title which the plaintiff now asserts—namely, to be protected from the payment of those calls; and, upon the question which I have now to consider,—whether I shall permit the action to proceed, so as to compel the plaintiff at once to pay that which the Company allege they are entitled to as against him, and as to which, he alleges that he cannot protect himself at law from paying,—I think it is a circumstance well worthy of consideration.

The order I propose to make, is to give the plaintiff the opportunity, if he so elects, to give judgment in the action at law, and pay the money into Court, and then to declare him entitled to the injunction. It is the usual way to give a plaintiff time to do this; and, on his failing to do so, the injunction is dissolved. If the plaintiff wishes to try the question of his legal liability, the injunction must be now dissolved, with liberty to apply after verdict at law.

Let the cause be in the paper on Wednesday next; and the plaintiff may in the meantime consider which alternative he will elect.

May 6th.

Mr. *Bethell*, as counsel for the plaintiff, having this day stated to the Lord Chancellor that the plaintiff declined to give judgment in the action, the injunction was thereupon dissolved.

Between THE COMPANY OF PROPRIETORS OF
 NORTHAM BRIDGE AND ROADS - - Plaintiffs,
 and
 THE LONDON AND SOUTHAMPTON RAILWAY
 COMPANY - - - - - Defendants.

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1840.
 May 11th,
 12th.

THE bill stated an act passed in the 36 Geo. 3, intituled "An Act for building a Bridge over the River Itchin, at or near Northam, within the Liberties of the Town and County of the Town of Southampton, and for making a Road from the said Town to the said Bridge, and from thence to communicate with the Road leading from West End to Botley, in the County of Southampton," whereby it was enacted, that the several persons therein named should be united into a company of proprietors, for the purpose of making and maintaining the said bridge and road, and should be a corporate body; and stated the clauses of the act authorizing and requiring the Proprietors to make and maintain the bridge and road; and, among others, that it was provided, that the said road should be of the width of forty feet at the least; and the Proprietors were empowered to erect and set up one or more toll-houses, toll-gates, or bars, and other proper conveniences for taking the tolls thereby granted in, upon, and across the road, as

The 70th and 71st sections of the Southampton Railway Act provide for the crossing by the railway of roads not being turnpike roads.

The 72nd section provides, that a turnpike road which shall be crossed by the railway shall be raised or sunk so as to pass over or under the railway.

The railway being proposed to cross the Northam Bridge Road in the mode provided for by the 70th and 71st sections, the plaintiffs, the proprietors of

the road, filed their bill, insisting that the road was a turnpike road, and praying to restrain the Railway Company from crossing over, or using the same, until they should have complied with the 72nd section.

On a motion for an injunction, the Vice-Chancellor, being of opinion that the road was not a turnpike road, and therefore not within the 72nd section, refused the motion, but on the application of the plaintiffs directed a case for the opinion of a court of law upon the question. A case was accordingly made for the opinion of the Court of Exchequer, and a certificate returned by the Judges of that Court, stating, that the Northam Bridge Road was a turnpike road.

The Vice-Chancellor, on an application by the Railway Company, refused to send the legal question for the opinion of another court of law.

Upon a motion for the injunction as consequent upon the above certificate:—*Held*, that as the objects of the plaintiffs must be to procure for the public using the road a compliance with the 72nd section of the Railway Act, upon the Railway Company entering into an undertaking to proceed with and complete a bridge over the road with all possible despatch, an injunction ought not to be granted during the time that must necessarily elapse in building the bridge.

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they should think proper; and it was provided, that the same road should be made and at all times maintained and repaired at the proper costs and charges of the Proprietors, by and out of the tolls thereby granted. And it was further enacted, that the right and property of and in the bridge and road, and of and in the toll-houses, gates, and bars, and other conveniences, should be, and the same were thereby, vested in the Proprietors and their successors, and they were thereby empowered to bring actions and prefer and prosecute indictments as therein mentioned. And it was further enacted, that the respective tolls therein mentioned should be demanded and taken at the several gates, toll-houses, and toll-bars to be erected under or by virtue of the now stating act, by such persons as the Proprietors should appoint, provided that it should be lawful for all persons or things chargeable with any of the tolls to pass once for the same toll over the said bridge and through all and every the turnpikes, toll-gates, and toll-bars, without being liable to pay a toll at each turnpike, toll-gate, or toll-bar. And it was thereby further enacted, that the road thereby directed to be made should be deemed and taken to be a turnpike road within the intent and meaning of an act of the 13 Geo. 3, intituled "An Act to explain, amend, and reduce into one Act of Parliament the general Laws now in being for regulating Turnpike Roads in England," and of the several acts made for the purpose of explaining, amending, or repealing the same, or some part or parts thereof; and that all and every clause and provision contained in the act of the 13 Geo. 3, subject to the provisions of the said other acts (except where the same were otherwise altered by the now stating act), should be in full force with regard to the road included in the now stating act as fully and effectually to all intents and purposes as if the now stating act had been made and passed previous to the act of the 13 Geo. 3. And it was enacted, that the now stating act should be ad-

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judged, deemed, and taken to be a public act, and be judicially taken notice of by all judges, justices, and others.

[The bill then stated another act of Parliament, passed in the 38 Geo. 3, for enlarging the powers given by the former stated act, but which act does not affect the present question.]

The bill then stated the completion of the building and making of the bridge and road, and that the same have ever since been and are now open for the use of the public, on payment of the tolls by the said acts authorized to be taken. That the bridge and road being of very great advantage and accommodation to the public, the traffic thereon is now and has been for many years past very considerable and extensive, and the tolls received by or on behalf of the plaintiffs, arising from such traffic, have been to a very considerable amount. That large numbers of persons daily pass along the footway by the side of the road, whereby the plaintiffs derive considerable income.

The bill, after stating the London and Southampton Railway Act, and the 9th section thereof, being the section empowering the Company to make and maintain the railway (a), stated the 70th and 71st sections; providing certain modes for the crossing by the railway of roads not being turnpike roads; that it was by the 72nd section of the said act enacted, that in all cases where the railway should cross any turnpike road, such turnpike road should be raised or sunk by and at the expense of the Railway Company, so that the same should pass over the railway, or that the railway should pass over the turnpike road by means of a bridge of such height and width, and with such an ascent or descent as were, by the now stating act, in that behalf provided. The bill then stated the 77th section, providing for the setting out and making of temporary roads in lieu of any roads, either public or private, which should be interfered

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with by the railway works (a). That the act now in recital should be deemed a public act, and should be judicially taken notice of as such by all judges and justices.

That the line of the railway crosses the road and footway, made under the powers and directions of the first stated act, at the distance of half a mile, or thereabouts, from the town of Southampton, and at a like distance from the Northam Bridge; and there is no direct or proper road for carriages and other vehicles, and no direct footway leading from Southampton to the bridge, except the said road and footway. That the line of the railway is on a level with the surface of the said road and footway.

That, in the month of November, 1838, or within a very short time previous thereto, the Railway Company cut through the surface of the road and footway, and laid down and fixed iron rails for the use of their railway upon and across the road and footway, and on a level therewith. That the Railway Company never made any application or communication to the plaintiffs, or to any person on their behalf, previous to the laying down of such iron rails, and the same were laid down and fixed without the consent of the plaintiffs.

That, with all possible despatch, after the fact had come to the knowledge of the plaintiffs, they caused a letter, dated 28th November, 1838, to be sent to the Secretary of the Railway Company. [The letter required the rails to be removed, or a bridge, as directed in the case of turnpike roads, to be built.]

That the Railway Company did not return any direct answer to the requisitions contained in the said letter until the 8th of January, when they refused to comply therewith. That long trains of waggons fastened together, belonging to the Railway Company, or their agents or contractors, and drawn by four or more horses, are frequently passing over

(a) Ante, p. 285.

and across the road and footway upon the iron rails so laid down and fixed as aforesaid, by which means the passage along such road and the footway is very materially obstructed and interrupted.

That, in addition to such obstruction and interruption, the Railway Company have, near the place where the iron rails have been so laid down and fixed as aforesaid, very recently, and since the 15th of May last, again cut through and broken up the greater part of the surface of the road, and the whole of the footway, and have deposited timber and other materials thereon, and have left a very narrow and wholly insufficient space only for the use of passengers and carriages intended to pass the road and footway, whereby, as the plaintiffs believe, many persons will be deterred from passing along such road, to the great loss and injury of the plaintiffs.

The bill charged, that the road is a turnpike road within the meaning of the Railway Act. That the Railway Company had no right or power whatever to lay down and fix such iron rails upon and across the road, or to carry the railway across the road on a level therewith, without building such bridge as in the Railway Act is directed, or to cut through and break up the surface of the road and the footway, or to obstruct or interrupt the passage thereon, before they had made another road instead thereof, as directed by the 77th section of their act. That the Railway Company have very recently declared, as the plaintiffs believe the fact to be, that they intend to open the line of the railway crossing the road and footway for the use of the public very shortly and early in the month of June next, and to use upon the same locomotive engines and other carriages to be propelled by means of steam power. That, by reason of the before-mentioned proceedings, the passage along the road and footway has been and is already materially obstructed and interrupted, and if such engines and carriages, to be propelled by steam as aforesaid, should be allowed to cross the road and

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footway upon the iron rails, or on a level therewith, there will be very considerable danger in passing along the road and footway, and many persons will be thereby deterred from using the same, by reason whereof the traffic thereon and the tolls arising therefrom will be materially diminished, and, independent of the danger to the persons passing along the road and footway, the plaintiffs will suffer very serious injury. The bill prayed—that it may be declared that the Railway Company are bound under their act of Parliament to cause the road leading from Southampton to the bridge at Northam to be carried over the railway, or the railway to be carried over the road, by means of a bridge, to be constructed in manner and form in the act in that behalf provided; and that they had no right to lay down and fix iron rails upon and across the road on a level therewith, or to obstruct the passage of the road and footway, and that they may be decreed to remove the iron rails, and to restore the road and footway to its former state and condition; and that they, their servants, agents, and workmen, may be restrained from using the iron rails so laid down and fixed upon and across the road as aforesaid, for the passage of any locomotive or other engine, or any steam carriage, or any other carriage whatsoever, and also from using or driving, leading or propelling, or causing to be driven, led, or propelled across or over the road by means of steam power, or otherwise, any engine or carriage whatsoever, or any cattle or horses, until such time as to this Court shall seem proper, or until the further order of this Court. And for further relief.

The plaintiffs moved for an injunction.

The Company filed affidavits in opposition to the motion, the object of which was to shew, that, as early as April, 1837, a line of rails had been laid across the Northam Bridge road, on which carriages drawn by horses had been in the constant habit of passing and re-passing, being facts well known to the plaintiffs.

Mr. *K. Bruce*, and Mr. *Taylor*, appeared in support of the motion for an injunction.

Mr. *Hill*, Mr. *Jacob*, and Mr. *Jemmett*, opposed the motion.

[The principal question, which was argued at considerable length, was, whether the road in question was a turnpike road. That point having been submitted for the opinion of a Court of law, the arguments thereon are reported upon the legal discussion. The alleged acquiescence having formed no ground of the judgment, the argument on that point is omitted.]

The VICE-CHANCELLOR.—The important question for me to determine, is a question I certainly was unwilling to determine; but, upon reading over all the papers, I think it is impossible for me to dispose of the case without, as far as I can, determining that question, which is, whether the Northam Bridge Road is a turnpike road within the meaning of the Southampton Railway Act. The 70th section of the Railway Act directs, that in case the railway shall cross any public highway, not being a turnpike road, on a level, the rail of such railway shall not rise above one inch or sink below the level of such road more than one inch; and the 71st section provides, that, in all cases wherein the railway shall cross any public highway, not being a turnpike road, on a level, the said Company shall erect and at all times maintain a good and sufficient gate in the manner prescribed in the section. The question, whether the Northam Bridge Road is a turnpike road within the meaning of this statute, seems to me to depend upon two considerations—first, are the tolls of the Northam Bridge Road applicable merely to a public purpose, or are they private property; and, secondly, what effect has been produced on the Northam Bridge Road Act by that species of repeal of the General Highway Act of the 13 Geo. 3, which has

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taken place by virtue of the 3 Geo. 4, coupled with a certain enactment in the 4 Geo. 4. By the Northam Bridge Act it is quite clear that the road is so constituted as to be a private road, except so far as a particular section subjects it to the operation of the General Highway Act. It is clear, upon the face of the act, that the tolls are receivable for the benefit of the Company of Proprietors; and the plaintiffs themselves allege, that the damage of which they complain is a private injury. The 53rd section of the Northam Bridge Act provides, "that the roads hereby directed to be made shall be deemed and taken to be turnpike roads within the intent and meaning of an act made in the 13 Geo. 3," (the General Highway Act), and of the several other acts made for explaining, amending, or repealing the same. [His Honor read the 53rd section.] A subsequent act, the 3 Geo. 4, was passed, and that act, by the 1st section, reciting, that the laws now in force for the general regulation of turnpike roads in that part of Great Britain called England are found to be ineffectual and require amendment, after specifying the act of the 13 Geo. 3, and the several acts explaining, altering, and amending that act, enacts, "that the same shall be, and the same is and are hereby repealed." Then the 4 Geo. 4, c. 95, s. 90, after reciting the act of the 3 Geo. 4, and reciting that doubts have arisen as to the roads to which the provisions of the said recited act extend," enacts, that nothing in the recited act, or this act, contained shall extend, or be construed to extend, to any road or roads not under the care and management of trustees or commissioners, or to any road or roads which shall be made, maintained, or supported under the provisions of any act or acts of Parliament passed for any unlimited period, notwithstanding tolls may be collected on such roads. That, therefore, is a declaration, that nothing in the recited act, or in the act of the 4 Geo. 4, shall extend to the Northam Bridge Road, because the Northam Bridge Road is a road falling within those classes

of roads which are specified in the 90th section. The matter stands thus: The act of the 13 Geo. 3 is repealed as to certain classes of roads. Now, if the 13 Geo. 3 had contained any clauses which in themselves directly refer to the Northam Bridge Road, then the repeal of the 13 Geo. 3, with a declaration that the repeal should not extend to anything which related to the Northam Bridge Road, would have kept in full force all those parts of the 13 Geo. 3 which related to the Northam Bridge Road: such is not the case; but it is the Northam Bridge Act which has itself directed that the Northam Bridge Road shall be deemed to be a turnpike road within the meaning of the 13 Geo. 3, and that all the clauses and provisions contained in the 13 Geo. 3 shall apply to the Northam Bridge Road. An act of Parliament is passed, which of itself repeals the 13 Geo. 3, and takes away the existence of those things which the Northam Bridge Act directed should be applicable to the Northam Bridge Road, and the consequence is, that the 53rd section of the Northam Bridge Road Act ceases to have any operation; and the exception which is contained in the 90th section of the 4 Geo. 3, is an exception which does not apply to the Northam Bridge Road, but is an exception which only applies to the 13 Geo. 3; and, inasmuch as there is nothing in the 13 Geo. 3 which of itself refers to the Northam Bridge Act, my opinion is, that the repealing of the 13 Geo. 3, with no other exception than that which is contained in the 90th section of the 4 Geo. 4, has operated wholly to take away that character which the 53rd section of the Northam Bridge Act gave the Northam Bridge Road; in other words, that, so far as the Northam Bridge Road is concerned, the act of the 13 Geo. 3 has become and is wholly inoperative; and that none of the provisions of the 3 Geo. 4, or of the 4 Geo. 4, are, by the very terms of the 90th section of the last act, applicable to the Northam Bridge Road; and, therefore, according to the best opinion I can form upon the subject, I think that the Northam

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Bridge Road is not a turnpike road within the meaning of the Railway Act. Then, if it be not a turnpike road, what case is there for applying to this Court for an injunction. The Railway Company have exercised the option which they have of crossing the Northam Bridge road on a level; and if my construction of the several acts of Parliament to which I have alluded be right, they are within the 71st section of the Railway Act,—that is to say, they were only bound to make gates of such a particular description as the 71st section points out; and, according to that construction, the 72nd section has no application. With regard to the question of acquiescence, I understand that the Railway Company began to lay down iron rails in the month of April, 1837; and, although it is admitted in the affidavits which are made on behalf of the Railway Company, that there has been some change of the rails or trams which had been laid upon the road, by laying down rails of a larger character and of a greater weight, and also that they have placed what they call a check-bar for the purpose of connecting the timber which supports those iron rails more firmly, it does not appear that there has been in effect any substantial variation in the mode of dealing with the Bridge Road from that mode which was first adopted in the month of April, 1837. It is manifest, that the original controversy between the two contending parties was upon the question, whether there should be a bridge made; and I must say, as far as I can understand the matter, there is no necessity whatsoever incumbent upon the Railway Company to make a bridge. But then it is said, that, under the 77th section of the Railway Act, the Company are bound to set out some other road. Now, that 77th section is as follows. [His Honor read the section.] I do not understand that the mode in which the Railway Company have dealt with the Northam Bridge Road amounts to a cutting that road through, or raising it, or sinking it, or so much injuring it as to make it impassable for passengers or carriages. They

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have done, as I understood, merely what I think they have a right to do—they have crossed it upon a level. It is impossible, upon these affidavits, to say, that the road is made impassable for passengers and carriages. The road, it is true, by reason of the Company complying with the obligations of the 71st section, has been to a certain extent contracted, because the contraction was made, as I understood it, for the purpose of erecting the gates which are spoken of in the defendants' affidavits; but the Northam Bridge Road, except so far as a portion of it has been diminished by the erection of these gates, remains precisely what it was before. It is not "taken."—"Taken," there, I apprehend, means taken in such a sense as that it shall become the property of the Railway Company. There has been the deposit of the iron rails across it, which merely give to the Railway Company the temporary use of it for the purpose of crossing with their steam carriages; and, in my opinion, it has not been cut through; and it has not been diverted, nor raised, nor sunk, nor taken, nor made impassable for passengers or carriages. I do not think the fact, that the Company have taken away the footpath has anything to do with the question, because the 77th section itself does not provide for the restitution of a footpath: it only provides, that there shall be set out and made instead thereof another sufficient carriage or horse road, (as the case may require), and says nothing about a foot road. It seems sufficiently manifest what the legislature meant, that the inconvenience to a foot passenger would be so very little if he had merely to cross the road upon a level, that he might equally well cross the road where the iron rails were laid as he might walk upon any footpath; it could only be for a short distance, and could not create any serious inconvenience. I feel a further doubt, whether, considering that this is a road crossed upon a level by the railway, it would be physically possible to make, as is contended for by the plaintiffs, another road for carriages and horses as con-

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venient as the former road. How could it be done? Carrying it round the terminus where the railway commences never could do. Crossing it in any other place would not make it better than it is; and if it were to be crossed by means of any subterraneous passage or aerial passage by means of a bridge, that would obviously not be as convenient as it at present is, because now the road itself, as it remains, is passable for horses and carriages, and is passable upon a complete level; and it appears to me, therefore, I confess, that that argument, founded upon the 77th section, which was not the real gist of the case, but was only thrown in to aid it, does not suggest any reason to enable me to interfere in the present case. My opinion therefore is, treating this as a motion heard upon the 10th of June, before the railway was in fact open, that I am not at liberty to grant any such injunction as is asked, or any other injunction against the Railway Company. At the same time, as the question, I admit, with respect to the turnpike road, is a question which I was very unwilling to give any opinion upon, and as to which I may have formed an erroneous opinion, it appears to me that, if the plaintiffs wish to prosecute the case any further, and wish to take the opinion of a Court of law upon that question, they should have liberty so to do. At present, therefore, I shall merely refuse the motion; and give the plaintiffs liberty to take such steps as they may be advised.

The following case, on the question, whether the Northam Bridge Road is a turnpike road, was sent for the opinion of the Court of Exchequer.

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COURT OF EXCHEQUER.

In Easter Term, 1840.

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against

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BY order of the Vice-Chancellor, the following case was sent for the opinion of this Court:—

By the 36 Geo. 3, c. xciv, s. 1, (local and personal), certain persons are incorporated by the name of “The Company of Proprietors of Northam Bridge and Roads.” By section 2, the Company are empowered to make, build, and keep in repair a bridge fit and proper for the passage of travellers, cattle, and carriages, with toll-houses, &c. The said bridge to be a public bridge, and all persons, horses, cattle, and carriages to have free liberty to pass over the same on payment of the tolls allowed by the act. By section 7, neither the bridge nor any tolls to be taken are rateable. By section 9, the Company are empowered to make two proper and commodious roads, communicating with the bridge; and on such roads to erect toll-houses and toll-gates, and for these purposes to take lands; the said two roads to be kept in repair at the cost of the Company. By section 23, the property of the bridge and

April 28th.

An Act of Parliament gave power, for an unlimited period, to a Company, to make and keep in repair a bridge and road, and to erect thereon toll-houses and gates, and to take tolls, (which were not to be rated to the poor); and enacted, that all roads thereby directed to be made should be taken to be turnpike roads, within the meaning of the general Turnpike Act (13 Geo. 3, c. 84).

The 13 Geo. 3, was repealed by 3 Geo. 4, c. 126. The latter

act was amended by 4 Geo. 4, c. 95, which, reciting that doubts had arisen as to the roads to which 3 Geo. 4 was intended to apply, enacted that nothing in that act should extend to roads not under the care of trustees or commissioners, or which were under acts passed for an unlimited period, although tolls were taken thereon.

Held, that (independently of the declaration in the statute) the road in question, being one on which the public had a right to pass on paying toll, and on which toll-houses were lawfully erected, was a turnpike road.

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roads is vested in the Company, Sections 24 and 28 empower the Company to raise funds for making the bridge and roads. Sections 25, 26, and 29 relate to the division of the capital into shares, and to the transfer thereof. Section 30 empowers the Company to borrow £8000 on mortgage, and regulates assignments of the property of the bridge, roads, and tolls, by way of mortgage, and also the transfer of such assignments. Section 46 gives a table of tolls, and vests the tolls in the Company. And section 52 enacts, "That the roads hereby directed to be made shall be deemed and taken to be turnpike roads, within the intent and meaning of an act 13 Geo. 3, intituled 'An Act to explain, amend, and reduce into one Act of Parliament, the general Laws now in being, for regulating the Turnpike Roads in that part of Great Britain called England, and for other Purposes,' and of the several acts made for the purposes of explaining, amending, or repealing the same, or some part or parts thereof, and that all and every clause and provision contained in the act of the 13 Geo. 3, subject to the provisions of the said other acts (except where the same are otherwise altered by this act) shall be in full force, with regard to the roads included in this act, as fully and effectually to all intents and purposes as if this act had been made and passed previous to the said act of the 13th year of his then Majesty's reign."

By 38 Geo. 3, c. lxiv, (local and personal), the width of the two roads is altered.

Both of the said recited acts are for an unlimited period, and neither act appoints trustees or commissioners for the care and management of the roads, but vests the same in the Company.

The Company of Proprietors, under the said acts of the 36 & 38 Geo. 3, proceeded to erect the bridge and to make the roads, and the same have been opened for public use, since the year 1800, and certain tolls have been taken, in pursuance of the provision of the 36 Geo. 3, c. 94, s. 46.

By an act, 3 Geo. 4, c. 126, intituled "An Act to amend the general Laws now in being, for regulating Turnpike Roads in that part of Great Britain called England," the 13 Geo. 3, c. 84, and various other acts of Parliament were repealed, and other provisions for the regulation of turnpike roads were substituted in lieu thereof. By section 4, it is enacted, "That all the enactments and provisions in the act contained shall extend, and be deemed and taken to extend to all acts of Parliament now in force, and to all acts which shall hereafter be passed, for making, repairing, and maintaining any turnpike roads in England, save and except [certain specified cases not applying to this case]."

By an act, 4 Geo. 4, c. 95, intituled "An Act to explain and amend an Act passed in the 3rd year of the reign of his present Majesty, to amend the general Laws now in being, for regulating Turnpike Roads in that part of Great Britain called England," it was, by section 90, enacted as follows:—"And whereas doubts have arisen as to the roads to which the provisions of the said recited act (3 Geo. 4, c. 126) extend, be it therefore enacted, that nothing in the said recited act or this act contained, shall extend to any road or roads not under the care and management of trustees and commissioners, or to any road or roads which shall be made, maintained, or supported, under the provisions of any act or acts of Parliament passed for an unlimited period, notwithstanding tolls may be collected on such roads; or shall extend to affect, alter, or interfere with the qualifications of any commissioners or other persons having the care and management of any such last-mentioned roads, or with any tolls taken or weights carried thereon, or in any other manner therewith." By sections 91, 92, & 93, certain other roads, amongst which are the road from London to Holyhead, the Commercial Road, and so much of the road from Carlisle to Glasgow as lies in the county of Cumberland, are exempted from the operation of the act. The case then recited the London and Southampton Railway

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Acts 4 & 5 Will. 4, c. lxxxviii, ss. 71, 72, and 1 Vict. c. lxxi, and the provisions therein contained for the crossing of turnpikes and other highways. The question for the opinion of this Court was, whether the Northam Bridge Road is a turnpike road, within the meaning of the 4th & 5th Will. 4, c. 88, s. 72.

D. Pollock (*J. H. Taylor* with him) for the plaintiffs (*a*). The true definition of a turnpike road is a road which the public are entitled to use by night or day, on payment of a fixed toll, and from which they cannot be excluded (*b*). Assuming that to be correct, the Northam Bridge Road is a turnpike road. It is so called in 36 Geo. 3, c. xciv, s. 46, and is, by the 52nd section, to be taken to be a turnpike road within the meaning of the 13 Geo. 3, c. 84. It is said that this section is repealed because the 13 Geo. 3 is repealed, but conceding that, the description given to this road by that act remains. Before the repeal of the 13 Geo. 3, no doubt could have been entertained on the question. [*Alderson*, B.—This road being vested in a company of proprietors, and not in trustees or commissioners, that body could not avail themselves of the provisions of 7 Geo. 4, c. 64, s. 17, in the case of stolen property.] It does not follow, because they are not within a particular turnpike act, that therefore this is not a turnpike road. The Commercial Road, which is called in the act a turnpike road, was excepted out of the general Turnpike Acts, 3 Geo. 3, c. 126, s. 149; and 4 Geo. 4, c. 95, s. 92; and yet it is not the less a turnpike road. A statute has since passed, (9 Geo. 4, c. 77), the 19th section of which re-enacts the 53rd section of the Northam Bridge Act, and places it under the general Turnpike Act. [*Parke*, B.—The 20th

(*a*) Feb. 23rd, before *Parke*, *Alderson*, and *Rolfe*, Bs.

(*b*) It is defined in Webster's Dictionary (New York, 1828) to be a road on which turnpikes or toll-

gates are established by law, and which are made and kept in repair by the toll collected from travellers or passengers who use the road.

section only continues the exception of the Commercial and Glasgow Roads]. This road is under the 19th section, and the Commercial Road is still *called* a turnpike road. A point to be attended to, in construing these acts, is the intention of the legislature to provide in railway acts for the convenience, security, and protection of the public travelling on roads. The construction should be made to favour the public. This road has all the ingredients of a turnpike road: tolls are taken, and the fact of the managers being a company instead of trustees is not material; for the nature of the interest of the governors makes no difference. *Rex v. The Trustees of Great Dover Street Road (a).*

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M. D. Hill, (*Jemmett* with him), *contra (b)*.—If the definition is correct which makes every road, where tolls are taken, a turnpike road, it would include railways, where tolls as well as fares are taken; canals, and rivers, which, being anciently navigable, have been made more commodious by cuts and locks; and such passages from one street to another, as the Halfpenny Hatch in Southwark. In all these, there is the indefeasible right to pass. Tolls are taken, and there is a duty to repair, without a co-extensive liability to which, toll thorough cannot exist. *Brett v. Beales (c)*. The clause in this act, as to keeping in repair, is inserted *ex abundanti cautela*, for the law would compel them to do so. *Rex v. The Severn and Wye Railway Company (d)*. [*Parke, B.*—The Company were compelled to reinstate, not to repair.] The principle is the same. Then what is a turnpike road? In *Rex v. The Staffordshire Canal Company (e)*, which was a question of rateability, *Lawrence, J.*, says, “This is not like the case of a turnpike, for there the tolls are paid for the benefit of the public, and not for the use of any individual;” which shews that he considered

(a) 5 Adol. & Ell. 692.

(c) 10 B. & C. 508.

(b) April 29th. Before Lord Abinger, C. B., *Parke, Alderson, and Rolfe, Bs.*

(d) 2 B. & Ald. 646.

(e) 8 T. R. 350.

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that to be the test. But for the special exemption, the tolls of the bridge would be rateable, and the general question of rating is, whether the subject-matter is available for public purposes and no other. See *Rex v. Salter's Load Shuice* (a); *Rex v. The Trustees of the River Weaver* (b); and the cases cited in *Regina v. The Mayor &c. of Liverpool* (c). [Lord Abinger, C. B.—I do not see how the question of rateability or nonrateability affects the case]. It is one of the incidents to a turnpike road, which may be defined to be a road whereon the Queen's subjects have a right to pass, governed by trustees or commissioners for a limited period, and where tolls are taken for the benefit of the road alone, and the surplus of which cannot be appropriated by the trustees. [*Alderson*, B.—Suppose their goods were stolen, would the property be laid in the surveyor of highways, under 7 Geo. 4, c. 64, ss. 16 & 17?] It could not be laid in the trustees or commissioners, for there are none: in that act, the legislature considered they had provided against every case relating to a turnpike road, by naming their public officers; this road has none. The 3 & 4 Will. 4, c. 80, requires annual statements of commissioners and trustees of turnpikes, to enable Parliament to obtain a perfect statistical account of the manner in which the sums are applied, and they treat as such roads all public ways, governed by public officers, the money of which is devoted to public purposes.

Another criterion is, that a turnpike road being public property, clergymen, voters, soldiers, and other public servants are exempted from toll; these exemptions would not extend to private roads, any more than exemption from rates; nor to railways, where it has been found necessary to pass an act to fix tolls even for mails. In 3 Geo. 4, c. 126, s. 4, there is a recital, that it is of great importance that one uniform system should be adhered to in the

(a) 4 T. R. 730.

(b) 7 B. & C. 70, n.

(c) 1 P. & D. 334.

laws for regulating the management and maintenance of turnpike roads throughout the kingdom : here is a road to which the code of Turnpike Acts does not apply, whereby that object would be defeated if it was so considered. It is not enough to find in any Road Act (an occupation road for instance) a declaration that it is a turnpike road ; unless it goes on to enact the levying of tolls, they could not be taken ; but this is not even a statutory declaration. In the 13 Geo. 3, there are no prospective words making it applicable to local acts not then passed ; and all that the 53rd section of the Northam Bridge Act says, is, that this act shall be considered as if it had passed in the 12 Geo. 3. It is perfectly reasonable to suppose, that, although the road was not a turnpike, it might be advisable, at that time, to treat it as one. Then the 4 Geo. 4 says it shall be so treated no longer. Section 90 omits the word “ turnpike,” it recites doubts, not that there are turnpike roads to which the exemption ought to extend, but that certain roads are not turnpikes. The limited period is another incident, and the Commercial and all the other roads excepted by name are governed by trustees or commissioners, and for a limited period, *Rex v. The Trustees of Great Dover Street Road* (a), and, therefore, clearly within the 4 Geo. 4, c. 95. It is an unsound principle to construe the words of an act, which calls a road a turnpike only to except it from certain liabilities, as being so stringent in definition as to make it one in reality.

D. Pollock in reply.—From the time of the act passing down to the 3 Geo. 4, this road was under the operation of the general Turnpike Acts; it was then excepted, which, if it was not a turnpike, would have been unnecessary. Rating has nothing to do with the question ; when the legislature thinks fits to make a road with toll-bars, and to

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put it under a corporation instead of trustees, and calls it a turnpike, the effect of which is to entitle the public to greater protection, that title ought to be construed with the greatest latitude.

LORD ABINGER, C. B.—I entertain no doubt upon this case. It is not a question to be determined by any act of Parliament: a turnpike road means a road with turnpikes on it, and it remains the same whether statutes are passed or not, and is not affected by powers being vested in trustees and commissioners or not. The origin of a turnpike road was, that certain persons subscribed to repair particular roads, and put up gates to make persons passing through contribute to the expenses. Then acts were passed to make it felony to break such gates, and to give other qualifications; but the gates upon the road were the distinctive marks of its being a turnpike. Then, does the Northam Bridge Act adopt that view? Section 9 gives power to erect toll-houses, gates, and bars, which, in my opinion, make it a turnpike. Then comes section 46, which calls those toll-bars turnpikes, evidently considering them synonymous terms. If this act had been passed before the 13 Geo. 3, it would have fallen in a great measure under its provisions. The repealing of that statute leaves turnpike roads standing as before; then comes a statute re-enacting the former powers. The 4 Geo. 4, c. 95 exempts certain roads mentioned in the former acts, where there was some doubt occasioned by the question of beneficial interest; but still they were turnpike roads, or there would not have been any question for doubt about them.

PARKE, B.—I am of the same opinion. The question turns on the 4 & 5 Will. 4, c. 88, s. 71. That section and the 72nd are both for the benefit of the public, who are to derive greater advantage from roads of greater traffic. Then what is the meaning of a turnpike road which entitles

the public to this advantage? In ordinary meaning it is a road where the public have a right to travel, and where toll-gates are lawfully erected; and this road comes within that meaning. If it could be shewn by the words of the statute or the context, that all roads not governed by the general Turnpike Acts were intended to be excepted, I should agree with the Vice-Chancellor. But I do not think this is the case with this. It was excepted by the 13 Geo. 3, not being under commissioners or trustees, and not of limited duration; but that statute has been repealed, and this road is not therefore excepted by the section in question.

ALDERSON, B.—I think the case is quite clear; no private individual has a right to fix a toll, which is a royal prerogative, although he may take a composition from individuals. He may do so indeed by act of Parliament, and erect gates and stop passengers till a toll is paid. I find this Company have a right to do all these things. Then further, section 53 of their act, after creating a road, under circumstances which I think sufficient to make it a turnpike, calls it so for certain purposes. Then, instead of literally re-enacting the provisions of the 13 Geo. 3, they pass section 53, which does so in effect with certain alterations; this therefore became a turnpike road subject to that statute with the alterations. Then comes a statute repealing 13 Geo. 3, which removed some of the regulations, but still left it a turnpike road. Afterwards the 3 Geo. 4, c. 126 was passed, which affected local acts with limited powers: this was found inconvenient as to some local turnpike roads, so they were excepted by 4 Geo. 4, c. 95, probably because (notwithstanding tolls were to be collected, which was the government criterion) it was found difficult to apply some of the terms; this inconvenience would be small where the period was limited; but where unlimited, very great. That appears to me to be the reason why the 19th section excepted them. I agree with Mr. *Pollock*, that we ought to give these

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enactments for the benefit of the public as liberal a construction as possible.

ROLFE, B.—I am of the same opinion. I think the road made under this act is a turnpike road within the 72nd section of the Railway Act, which provides for the convenience of the public whose roads are intercepted, greater or less accommodation, as applied to turnpike roads and other highways. A turnpike road means a road where there is a right to set up a bar to prevent people going through, except on payment of toll; not because it is so called in the 53rd section of its act. The difficulty before the Vice-Chancellor arose from attending to that section too particularly. I do not think it made this road a turnpike, which it was of necessity before, it only applied to it the turnpike code. I do not admit that code to have been abolished with regard to this road, but that is not necessary to consider here. It is enough to say that this is a road where the makers have a right to set up gates and take tolls, and is therefore a road of that important character for which the legislature intended an important benefit.

A certificate was returned to the Court of Chancery, to the effect that the Northam Bridge Road was a turnpike road.

May 11th.

THE above certificate having been returned to the Vice-Chancellor, the Railway Company applied to have the opinion of some other Court of law taken upon the question (a).

The *Solicitor-General*, Mr. Hill, Mr. Jacob, and Mr. Jemmett supported the application.

(a) On the 11th of May the London and Southampton Railway was opened throughout the whole extent of the line.

Mr. *K. Bruce* and Mr. *Taylor* opposed it.

In the course of the argument, the case of *Kemp v. The London and Brighton Railway Company* (a), was cited by the counsel for the plaintiffs.

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VICE-CHANCELLOR.—This case differs essentially from that of Mr. Kemp, who had a private road, as to which the provisions of the Brighton Railway Act were as follows:—that that private road should not be interfered with until the Company had made another road as convenient as the existing road, or as near thereto as might be;—so that, according to that act, there was no question about the *prima facie* right of Mr. Kemp; it lay upon the Company to shew that they had made another road as convenient as the former, or as near thereto as might be. But this case is obviously different, because, before a Court of Equity would interfere on behalf of the plaintiffs, it would require them to shew that the Northam Bridge Road is a “turnpike road,” and, therefore, I certainly thought, when the case was first brought before me, that if there was a fair question upon that point, I could not make an assumption one way or the other; and I thought that I was bound to see that they, who came to a Court of Equity seeking relief, did sustain that legal character which would entitle them to have that relief.

The matter was strongly argued; and I recollect that great stress was laid upon what, on the part of the plaintiffs, was contended to be the true construction of the 53rd section of the Northam Bridge Act, as connected with the general Highway Act, the 13 Geo. 3, and the acts of the 3 Geo. 4, and the 4 Geo. 4. It was insisted, that the true construction of those four acts, taken collectively, was to leave the Northam Bridge Road a turnpike road under the provisions of the 13 Geo. 3. That was one of the points,

(a) Ante, p. 495.

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which, at the time when the argument was first addressed to me, I could not bring my mind to acquiesce in, and, upon consideration, I do not now acquiesce in it. On the contrary, when I find, as is manifestly clear to me, that the 53rd section of the Northam Bridge Act has, by an *ex post facto* act, brought the Northam Bridge Road within the provisions of the 13 Geo. 3, and when I find the 3 Geo. 4 reciting the 13 Geo. 3, and the other Highway Acts, which, by its first section, it repeals, and reciting the necessity for there being one uniform set of provisions for all highways, and the subsequent act of the 4 Geo. 4, reciting a limited provision of the 3 Geo. 4, repealing that provision, and substituting other provisions in lieu thereof, then repealing or altering certain other sections of the same act, and introducing new sections of its own up to the 90th section, commencing as it were afresh from that 90th section, reciting that doubts had arisen as to what roads the provisions of the recited acts extended, enacting that nothing in the recited act or this act contained shall extend or be construed to extend to any road of a specified description, which description includes the Northam Bridge Road, my opinion is, that it never was the intention of the legislature that the last-mentioned section should in the least degree operate upon the first section of the 3 Geo. 4. The language of the section is this: "Whereas doubts have arisen as to the roads to which the provisions of the said recited act extend;" and it seems to me that what is there meant by the word "provisions" is not the repeal of the general Highway Acts, but of those provisions which are mentioned in the 2nd section, and which are to be found in all the subsequent sections of the 8 Geo. 4; and moreover it appears to me that having repealed the 13 Geo. 3, and all the other Highway Acts, this act in no way revokes that repeal. It is only that this provision shall not extend to certain roads, but the Highway Act did not extend to those roads. If there had been any provisions in the general

Highway Acts, which of themselves extended to those roads, there might have been something in the argument, but, inasmuch as the 13 Geo. 3, did not of itself extend to the Northam Bridge Road, that 90th section would not extend to that road. With the exception of its effect on the Northam Bridge Act, it appears to me quite immaterial how far the language of the 90th section of the 4 Geo. 3 affects the act of the 13 Geo. 3.

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I certainly thought it right not to grant the injunction without first having the legal construction of the words "turnpike road," as used in the 72nd section of the Railway Act, declared to me by a Court of Law; and there was no appeal from the order which I then made.

A case was then very fairly drawn and sent to the Court of Exchequer. The real question was, whether the Northam Bridge Road was within these words, "any turnpike road," and it might be considered to be a turnpike road, as coming within the general definitions of the Highway Acts, or as being in effect a road upon which there was a turnpike, that is to say—presenting some obstruction to the public passing along the road, except upon payment of a toll applicable in part to the sustentation of the road.

Upon the legal question, the Court of Exchequer has come to a deliberate judgment, and they certify to me, that the Northam Bridge road is a turnpike road; I am, however, asked to refuse to accede to the certificate.

It may easily happen that upon a case, or upon an issue, such a certificate may be returned, or such a verdict found, as that in either instance this Court would have been better satisfied had the reverse of that certificate been returned or the reverse of that verdict found. I apprehend, however, that the Court does not refuse to act upon a certificate or finding merely because a contrary opinion might have appeared to the Court to be equally right. I do not think I can judicially dissent from the certificate unless I see some-

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thing that is clearly wrong, some plain violation of an acknowledged principle, something which convinces me that it cannot possibly be right. The present case is a case of general application, and I believe it is the first time that the question has arisen. The matter has been sent to the Court of Exchequer, and the Barons of that Court have unanimously certified their opinion; and there may be very good reasons assigned why the construction they have put upon the act is the right construction. I think the 71st and 72nd sections of the Railway Act cannot be read without seeing that the object of the legislature was to require more security in cases where it was probable there would be more danger, that more precaution should be made by the Railway Company for the security of the Queen's subjects in some cases than in others, and with that view the legislature has drawn a distinction between different roads by using the terms "turnpike road" and "public highway not being a turnpike road."

I do not think that the certificate is so wrong that I am judicially bound to send the case to another tribunal; on the contrary, it appears to me, that, having now before me the opinion of the Barons of the Exchequer on the point, I have the law certified with sufficient clearness to enable me to proceed with the question of equity; and, according to the best opinion I can form, I think I should not be doing that which would be either wise or useful or consistent with my judicial duty if I were to send this question to another Court of law.

Mr. *K. Bruce* and Mr. *Taylor* moved for the injunction as prayed by the bill.

Mr. *Hill*, Mr. *Jacob*, and Mr. *Jemmett* opposed the motion, and contended,—

That it was a principle of a Court of equity not to grant

an injunction when it would operate harshly on the one party without benefiting the other. *Spencer v. The London and Birmingham Railway Company* (a).

That the suit being instituted for compelling, the erection of a bridge for carrying the plaintiff's road over the railway, an object for the attainment of which a mandamus was the proper and direct proceeding,—this Court, if it interfered at all, would not grant an injunction which would have a more injurious effect on the Company's works than a mandamus would have.

That the railway having been opened throughout the whole extent of the line, could not be instantly closed against the public, and therefore, if an injunction were granted, a reasonable and sufficient time must be allowed to afford the Company opportunity to give notice of and otherwise anticipate the effect of the injunction. *Semple v. The London and Birmingham Railway Company* (b).

Mr. *K. Bruce*, in reply, contended, that the injunction of this Court followed as a matter of right on the establishment of a legal title; if it were otherwise, the plaintiffs had in effect gained nothing by the certificate of the Court of Exchequer in their favour. If no relief was to flow from that certificate, it would have been more advantageous to the plaintiffs not to have obtained the decision. That no case had ever occurred in which, after a Court of equity had sent a question for the opinion of a Court of law as preliminary to the question of injunction, it had refused to act upon that opinion when obtained. That the Company had opened their railway with complete knowledge of their liability to the injunction. That, in the case of Mr. *Semple*, the Court had given a certain time to allow fires then

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(a) Ante, 159.

(b) Ante, 132.

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burning in the Company's coke works to expire, not upon any rule of equity, but on account of the physical impossibility of their being instantaneously extinguished.

VICE-CHANCELLOR.—I do not recollect that I ever intended that it should be understood as a matter of course that, upon the Court of Exchequer deciding in the way in which they have decided, then the injunction should go. The impression on my mind, as far as I can recollect, is, that it was to be competent for the parties against whom the application was made, to state anything further on affidavit as to facts preceding the time at which the motion was made, which they might think would tend to shew that the injunction ought not to be granted. I meant to leave the matter open, so that it might receive such further discussion, as either any new view of the facts as they stood, or the production of any further facts, might make necessary. But, after having heard the matter now fully discussed, I think that, according to the law, as laid down by the act of Parliament, it never was intended that the Company should cross a turnpike road upon the level; in other words, that although they might carry their railroad on the horizontal level of the turnpike road, yet, in that sense, they would be bound to make a bridge, which would virtually be a new formation of a certain part of the turnpike road, and to save the public from that danger and inconvenience which in the other alternative might arise. That appears to me to be plain; and, as I understand the act of Parliament, the Company had it in their option either to build the bridge first, and afterwards make their railroad pass over across the turnpike road, or, in the first instance, to make their railway in such a manner that it should cross the turnpike road in the level; in which latter case they would be bound, before they used the railroad as a railroad, to make the bridge which the act of Par-

liament prescribed. I do not see how it is possible to have a doubt upon that,—observing the particular language which the legislature has thought proper to adopt in the 70th, 71st, and 72nd sections. Here they have elected that in effect a bridge shall be built to pass over the railway. Now the bill is filed, not asking directly for a declaration that the bridge shall be built, as if there existed any jurisdiction in this Court to direct the building of a bridge, but, as appears to me, very properly framed in this way: the bill asks that the Company shall be prevented from using their railway, until they first build a bridge; and why this Court should not interfere by injunction, so as to give the public at large the right which the act of Parliament meant the public to have, I am unable to see. I recollect that there was a good deal of discussion about the lying by or imputed acquiescence: but inasmuch as the Company were all along only proceeding in the ordinary way of their operations, and only laying out such money as was necessary for the purpose of making the railway in the manner in which by law they might make it,—it appears to me that the mere circumstance that some of the agents of the plaintiffs might see what was done is no reason why the Court should not now interfere. If it were lawful for the Company, in the first instance, to make their railway, and then to build the bridge,—then, until they began to use the railway, there was no occasion for the Company to interfere. If the railway, so long as it was not used as a railway for steam carriages, did not prevent the passage along the turnpike road, it appears to me that time is very immaterial; but, in point of fact, as I understand it, when the sleepers were laid down, then the discussion began, and went on until some time in the month of March. The plaintiffs then became convinced that they ought to take some active measures, and they considered what those measures should be; and it was quite right that they should consider before engaging in a

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suit of this nature, especially as they were distinguished by letter that the opinion of very eminent counsel had been taken, and that that opinion was in favour of the legal right of the Railway Company. It has been ascertained that the Northam Bridge Road is a pike road; and it appears to me that it follows almost as a consequence that there should be an injunction.

I must say that, with reference to my first order, all along appeared to me, that the first and most necessary step was to have it ascertained that the plaintiffs had the right, which they could not have, unless it should be determined as a matter of law, that the Northam Bridge Road was a turnpike road; and although observations have been made on that order, it appears to me, that it is a preliminary question, whether the plaintiffs are in law entitled to sue, ordinarily speaking, that question must be determined before the Court enters into a consideration of the facts of the case; and, if the matter comes over again, I think that I should be bound to follow the same course. The only question is, what is now to be done?

The real object of the plaintiffs must be, that they have a bridge; and I therefore think that if the Railway Company will *bonâ fide* undertake to build the bridge, and the Court sees that there is no reason to doubt their fulfilling their undertaking, it would be an extremely unnecessary, and injurious thing to restrain them meanwhile from using this road. I do not advert to the interest of the public at all. I have nothing to do with it. I consider these parties as coming before me in the private capacity, just the same as I consider the Northam Bridge Company to be suing as a private body. I have not thought proper—although they may have in some respects which to a certain extent are public—to associate themselves with the Attorney-General, therefore they are

in their private character. As I should be unwilling to inflict that sort of permanent injury, or at least long continued injury, on the Railway Company, if I could be reasonably satisfied that the Company would either build that bridge, which under the act they are bound to build, or would in some other manner, to the satisfaction of the Northam Bridge Company, arrange the question, I would refrain from granting the injunction at present, but of course would give leave to apply from time to time; for it appears to me that if the Northam Bridge Company insist upon their right, they are entitled to have the bridge.

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Mr. K. Bruce.—The counsel for the plaintiffs cannot enter into any arrangement, but must insist upon their right to the injunction.

VICE-CHANCELLOR.—I do not think that I ought now to grant an injunction. The object of the suit is to procure for the Northam Bridge Company their legal rights, and it appears to me, that if the Railway Company do forthwith begin to build a bridge, the plaintiffs will in effect have that to which they are entitled.

Mr. K. Bruce.—Then the motion is refused?

VICE-CHANCELLOR.—No. I do not refuse the motion. I shall grant the injunction, if I find that it is necessary to procure that, which, as it appears to me, is the plaintiffs' right, namely, a bridge.

The order was:—

“The defendants by their counsel undertaking forthwith to build such bridge for the passage of the Northam Bridge Road over the defendants' railway in the plaintiffs' bill mentioned, as is directed by the act of Parlia-

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ment made and passed in the 5th year of the reign of William 4th, in the pleadings in this case mentioned, this Court doth not at present think fit to grant an injunction, but doth order that this motion do stand over, with liberty to either party to apply to this Court as they may be advised."

Between WILLIAM JONES, JOHN JONES, and
BISLEY JONES, - - - - - Plaintiffs,
and

March
2nd, 16th.
May 6th.

THE GREAT WESTERN RAILWAY COMPANY, Defendants.

By an agreement between the plaintiffs and the agent of a Railway Company, the former agreed to sell to the Company a certain portion of a field for the price of £229 in the whole, being £120 for the land, and £109 for compensation for

THE bill stated the act of Parliament incorporating the Great Western Railway Company (a). The 5th section of the act empowering the Company to make the railway; the 8th conferring on the Company the usual and necessary powers for making and maintaining the railway; the 12th giving to the Company power to treat for the purchase of lands; the 22nd requiring persons to deliver a statement of their estates and claims in land required to be purchased by the Company, within one calendar month after notice

damage by severance to the remaining portion. The agreement contained a stipulation—that in case additional land shall be wanted by the Company, the same shall be taken and paid for after the same rate per acre.

The Company subsequently took possession of a second portion of the field for purposes authorized by their act, and entered upon the same without having previously paid the purchase-money for that second portion, after the rate specified in the agreement, and without having previously agreed upon or ascertained by reference to a jury the damage occasioned by the severance of the second portion from the remaining portion of the field.

A bill having been filed for an injunction:—*Held*, by the Lord Chancellor, that the agreement only provided for the amount to be paid to the plaintiffs for the value of the second portion of the field, and that neither by intention nor legal construction did such value include the amount of damage by severance to the remaining portion of the field, which amount was either to be agreed upon by the parties or ascertained by a jury. That until such amount was agreed upon or ascertained, the Company were not entitled to enter upon the second portion.

Upon the undertaking of the Company to pay the amount of damage to the land by the severance, and to take proper proceedings, if necessary, for ascertaining the amount of such damage, the injunction was withheld.

(a) Ante, p. 1.

by the Company of their intention to take such land; the 23rd providing for the impannelling of juries, to assess and give a verdict for the value of land required by the Company, and compensation for damages occasioned by severance of lands, as to which the parties entitled shall be incapable or shall refuse to treat with the Company; the 32nd requiring tenants at will of lands taken by the Company to quit the same, at the expiration of six calendar months after a notice to quit; the 42nd empowering the Company upon payment or tender of the purchase-money, either agreed on or ascertained by a jury as aforesaid for land required by them, to enter upon the land, with a proviso restraining such entry, except for the purpose of setting out the same, before such payment or tender as last aforesaid; the 43rd requiring compensation to be made for lands which the Company may require for temporary purposes, with a proviso restraining the Company from using land for such temporary purposes, before they shall have given fourteen days' notice of their intention so to use the same, and requiring compensation to be made for such use, within one calendar month after the expiration of the time by the act limited for making the railway; the 79th enacting, that where small parcels of land are intersected by the railway and works, the Company shall be compellable to purchase the whole of such parcels, and the 80th empowering the Company to purchase fifty acres of land, in addition to land before authorized to be purchased or taken, for providing additional stations.

The bill then stated the alteration and amendment of the first-mentioned acts, by four subsequent acts. The first made and passed in the 6 Will. 4, intituled, "An Act to alter the Line of the Great Western Railway, and to amend the Act relating thereto." The second in 1 Vict., similarly intituled, by the 12th section whereof, the Company are empowered to contract with any person or corporation, who should be willing to sell the same, for fifty

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additional acres, for providing and making additional stations. The third also in the 1st Vict., intituled, "An Act to enable the Great Western Railway Company to extend the Line of the Railway, and for other Purposes relating thereto;" and the fourth in the 2nd Vict., intituled, "An Act to amend the Acts relating to the Great Western Railway Company, and to raise a further Sum of Money for the Purposes of the Undertaking;" by the 18th and 22nd sections of which last-mentioned act, the 42nd and 43rd sections of the first stated act are re-enacted or extended.

That at, and previous to the passing of the first-mentioned act, the plaintiffs were seised of or entitled to them and their heirs, as tenants in common in possession of a certain open field of arable land, containing four acres, one rood, adjoining to the high road on the one side and to certain other lands on the other side thereof, and they are now so seised thereof, except of such part thereof as they have agreed to sell to the Company. That the Company required for the line of the railway a portion of the said field, as well as certain other small pieces of land in the same parish, to which the plaintiffs were entitled in remainder in fee-simple, after an estate for life therein. That in the month of April, 1838, the plaintiffs and the tenant for life of such last-mentioned pieces of land entered into an agreement in writing with the Company, for the sale to the Company of, together with the said other pieces of land, so much of the said open field as was then required by the Company, containing altogether 1a. 2r. 31p., at or for the price of £229 in the whole, including severance and damage. And such agreement contained a stipulation, that, in case additional land should be required by the Company, the same should be taken and paid for after the same rate per acre as above stated. That the said field was in the form of a right-angled parallelogram, and the portion thereof agreed to be sold to the Company, was a narrow

strip lying in an oblique direction from the south-west end of the field, which adjoins the high road, to the south-east, which adjoins the said other lands, and contained 2r. 5p. That the strip of land actually taken by the Company exceeds the quantity comprised in the agreement by nearly one quarter of an acre, and in fact contains 3r. 4p., and, by the direction in which it intersects the field, separates a portion of the field which does not in any part adjoin to the other lands of the plaintiffs. That the Company have entered into possession of the said enlarged portion of land, and have inclosed the same, but have not paid the purchase-money or any part thereof. That in the month of March, 1839, the Company entered upon and staked out, for the purpose of a station, other parts of the said field, and in August last they again entered upon the field, and removed the marks or stakes which they had placed thereon in March as aforesaid, and staked out a larger quantity of the same field for a station or other permanent conveniences connected with the railway, and the parts of the field so staked out comprise the whole of the south-west corner thereof, containing 1r. 16p., on the one side of the portion of land taken by the Company for the line of the railway, and the whole of the remaining frontage adjoining the high road on the other side of the same portion. That about a fortnight ago the Company again entered upon such parts of the field as they had staked out as last mentioned, and have commenced breaking up the soil, and have commenced and are rapidly proceeding with buildings thereon. That no contract or agreement whatever, save the agreement of April, 1838, has been entered into by the plaintiffs and the Company, for the sale or appropriation of the field or any part thereof, nor has any price been fixed or proposed to the plaintiffs, for the purchase or appropriation of the pieces of land so staked out as last aforesaid, or any part thereof, by or on the part of the Company, nor has any jury been impanelled or summoned for assessing the money to be paid for

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the purchase thereof, or as a compensation for the damage done thereto by the Company, and no notice or intimation whatever, save so far as the agreement of April, 1838, or the staking out aforesaid may be deemed to be notice, has ever been given to the plaintiffs of the intention of the Company to purchase or appropriate, or to take or use the same or any part thereof. That the plaintiff W. Jones is the tenant of the said field at a yearly rent, and he resides at the distance of more than a mile from the said field, and he is in the winter season not in the habit of visiting the same for weeks together, and, not having seen it for many days previously, he did not until within the last few days discover, nor were any of the plaintiffs until within the last few days aware, that the Company had commenced such building operations, and no notice whatever requiring the plaintiff W. Jones to deliver up possession to the Company of such parts of the field as were so staked out as last aforesaid, or of the Company requiring such parts of the field for the purposes of the railway has ever been given or left at the place of abode of the plaintiff W. Jones, or left upon the premises, save so far as the agreement of 1838, and such staking out as aforesaid, may be deemed to be notice. That no payment or legal tender of any sum for the purchase of any part of the field, or for satisfaction, recompense, or compensation for the value of the plaintiff W. Jones's interest, as tenant, has ever been made or proposed by the Company to the plaintiffs or either of them. That great and irreparable mischief will be sustained by the plaintiffs, if the Company, without duly conforming to the provisions of the said several acts of Parliament, shall proceed with such building operations upon such parts of the field as are not comprised in the agreement of April, 1838, and for which injury the plaintiffs have no adequate remedy at law. That the plaintiffs have requested the Company to desist from their works, and to come to terms with the plaintiffs for the purchase of such parts of the

field as the Company may lawfully require for the purposes of their act, and the plaintiffs are ready and willing to agree with the Company for the sale to them of so much of the field as, in addition to the part comprised in the agreement of April, 1838, may be necessary for the lawful purposes of the railway.

The bill charged, that the plaintiff W. Jones is prevented, by reason of such occupation by the Company, from using the land for agricultural purposes, but is, nevertheless, liable for the rent, taxes, and rates of the same. The bill prayed that the Company, their clerks, servants, surveyors, workmen, or agents, may be restrained from digging and breaking up the soil of any part of the field aforesaid, belonging to the plaintiffs, other than and except the three roods four perches thereof, so taken and used by the Company for the line of the railway, and from bringing and depositing thereon, or on any part thereof except the said three roods and four perches, any bricks, stone, flints, timber, iron-work, lime, sand, or other building materials, and from making or continuing to make thereon, or on any part thereof, except as aforesaid, any excavations for foundations of buildings, or for any other purpose, and from commencing and continuing to erect and construct any building, machinery, apparatus, or other matter or thing thereon, or on any part thereof except as aforesaid, or otherwise committing or doing any waste or damage thereon, or on the ground or soil thereof, except as aforesaid; and that the Company may in like manner be restrained from disturbing, intermeddling, or interfering with the plaintiffs' possession or enjoyment of the said field, otherwise than according to the provisions of the said act; and that the Company may pay to the plaintiffs the costs of this suit; and for further relief.

The facts stated in the bill were supported by affidavits. Notice of a motion on the part of the plaintiffs for an injunction according to the terms of the prayer of the bill was given.

The Company filed affidavits in opposition to the mo-

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tion, and by one of such affidavits, D. Lousley, who had, as the agent and on behalf of the Company, made and signed the agreement of April, 1838, deposed, that at the time when that agreement was entered into, it was understood by deponent, and as he verily believes by the plaintiffs, that, under and by virtue of such agreement, the Company were to be at liberty to take and use the said one acre, two roods, thirty-one perches of land, as well as any further or additional land they might require, either for the line of the railway, or for any other purposes connected with the railway, and that any additional land might be taken and used from time to time as in the progress of their works might be found requisite, and whether the period by the acts of Parliament limited for the compulsorily taking of lands should have expired or not; and that any additional land so taken was to be paid for by the Company at the rate of £70 per acre, being the same rate at which the said one acre, two roods, and thirty-one perches of land were purchased.

That the said agreement was as to part thereof in writing, and as to other part thereof, including the clause relating to the taking of additional land, a printed form of agreement generally used in making contracts for the purchase of lands by the Company, and the object of the clause was to enable the Company at any time, or from time to time, until the works of the railway should be completed, to take at a fixed price any further or additional land they might require for the line of their railway, or for a station or any other purpose whatever.

There was also evidence adduced by the Company to shew a knowledge, on the part of the plaintiff W. Jones, of the works of the Company.

By affidavits in reply, the facts stated by the Company's affidavits were denied.

Mr. *Wigram* and Mr. *Greene* moved for an injunction.
The motion was heard on the 2nd and 16th of March.

The Company paid into Court the amount of the value of the land, calculated at the rate of £70 per acre.

VICE-CHANCELLOR.—I certainly think there has been a considerable degree of acquiescence on the part of the plaintiffs. The real question before me is, whether I ought now upon the 16th of April to interfere to prevent the Company from doing that which, as I understand it, the plaintiff W. Jones certainly had an opportunity of knowing they were doing, and might very well have known they were doing since the 14th of January, and, as it would appear from the affidavits, might have known it from a much more distant period.

With regard to the principal question, it appears to me that it would be proper, if the parties will agree, that there should be a reference to ascertain what is the amount of the land, and what is the value to be paid for it, having regard to the original agreement: then the Master will be bound to consider how far there is injury done by reason of there not being that sufficiently convenient road, which the plaintiffs say they ought to have. If they are damnified by reason that the road, which the Company admit they are bound to make, is not such a convenient road or access as they before had, then the taking of the land in the mode in which the Company have taken it, will be a circumstance in respect of which something is to be allowed for damage: that I can understand; but it appears to me I confess, on what has taken place, that all that the plaintiffs can be entitled to, is, to have the payment of such a sum of money as will be a fair sum for the acreage quantity and in respect of the damage.

Mr. *K. Bruce*, Mr. *Jacob*, and Mr. *Stevens*, appeared for the Company.

The plaintiffs moved before the Lord Chancellor for an injunction.

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Mr. *Wigram* and Mr. *Greene*, for the motion.

Mr. *Jacob*, Mr. *Turner*, and Mr. *Stevens*, contra.

[The arguments sufficiently appear by the judgment of the Lord Chancellor.]

May 6th.

LORD CHANCELLOR.—I have no doubt whatever on the construction of this contract, nor does it appear that before it was raised at the bar, any doubt has ever been entertained. I concur with the construction which Mr. Jacob put upon the contract, namely, that £70 per acre is to be the sum paid for the new purchase, but then it leaves the question of compensation for damage open. It is not, as it has been contended, a contract to this effect:—that the Company should pay £70 per acre for the land, and that there should be no compensation for damages according to the extent of injury done.

The Company never so understood it,—the Vice-Chancellor did not so understand it,—nor is it capable of receiving that construction; because the contract on the face of it divides the fund, and having in the first instance stated a certain sum to be paid, it afterwards subdivides that sum, and states that £120 is to be the price for the land, and £109 for the severance and other damage. If the Company wanted to buy the land, they are bound to pay both,—they are not merely to pay the price of the land independent of any damage that may be done to any other part of the land, but they are to pay both the value of the land which they have purchased, and they are to compensate the owner of that land for damage consequentially done to other parts of his property. By the terms of the contract they are to pay £120 for the purchase of land, and £109 as compensation for the damage occasioned by the taking that piece of land; not damage to the land taken, but to other land not taken. Then the contract says, “In case addi-

tional land shall be required by the Company, the same to be taken and paid for after the same rate per acre as is above stated." What is above stated is, that £120 is the price of the land, which, on a division according to the quantity of land taken, comes to £70 per acre. Then the Company in the first place say they want a certain portion of land, which cuts off one small triangular piece of land, and leaves the other part with an ample abutment on the turnpike road. They afterwards want, for purposes which I suppose to be within the meaning of their act, some more land, and they take the whole of that portion of the land which abuts on the turnpike road. Now if it were possible to put a construction on the contract and agreement to the effect that the Company are to take that piece of land without making any further compensation for damages as to the remainder, it would be a most harsh thing on the part of the Company to enforce it; but the agreement entered into, and their act itself, does not enable them to do this, because the Company are to pay for compensation for damage nearly as much as they are to pay for the land taken,—and that too where the damage is comparatively small; but where the damage is infinitely greater, from the fact of the cutting off the land which the Company do not take, from the only access to the turnpike road, it is said that there is to be no compensation at all, so that they are to leave that portion of the land which they do not want, without any other outlet or communication than that by means of the road to be made under the compulsory provisions of the act, and deprive that part of the land of that access to a turnpike road which every person knows adds to the value of any land.

It is therefore quite clear that the agent of the Company put a right construction on this, and I do not understand that any doubt is raised as to the construction. It is quite true that, for the land they have taken, they are to pay at the same rate per acre as they paid for the former land; but it is true that that is only part of what they are to pay:

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they must also pay for the damage done to the land which they do not take, occasioned not by what they did before, but by what they are now obliged to do,—namely, taking all the frontage to the turnpike road.

The Company now dispute their liability, although their agent does not dispute it, and although their counsel here do not dispute the contract. The only contest between the parties has been because the Company deny their liability to pay compensation for damage. I must assume that, because I find that it was matter of contest before the Vice-Chancellor.

I think the Company are wrong in attempting to put that construction upon the contract. I see no reason why the money is to remain in Court, and why it is not to be paid to the plaintiffs. There is no question raised upon the title. [It was here stated to the Lord Chancellor that there was some question as to the title.] If there is any question on the title, of course that must be the subject of further inquiry. I have no facts as to the title before me.

I have no difficulty whatever in saying that the Company are bound to pay for the additional quantity of land at the same rate, taking £120 as the value of the other quantity of land, according to measurement, and to make compensation for the damage done to the land which they do not take, in consequence of this last purchase. I presume there will be no difficulty in coming to some arrangement by which the amount of the compensation can be ascertained. I certainly shall use the jurisdiction of this Court for the purpose of compelling the Company to do justice to individuals. I will not do so unnecessarily, so as to interfere with the works, but I will take care to reserve to myself the power of doing so, in order that justice may be done. The parties had better endeavour to come to some arrangement as to how the amount can be ascertained. The act prescribes a mode of doing this, and unless the parties can

themselves discover some mode which is more convenient and less expensive, the question must go to a jury.

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[This case having been mentioned,]

LORD CHANCELLOR.—I shall not grant the injunction, the Company undertaking to pay for the part to be taken at the rate of £70 per acre, and to go before a jury, to have the damages by reason of severance ascertained: the Company undertaking, if this is not properly acted on, that I am to consider the injunction as from the present day.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Sittings after Michaelmas Term, 1839.

THE COMPANY OF PROPRIETORS OF THE LANCASTER
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against
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Dec. 2nd.

In an act of Parliament, which authorized a Company to make a navigable canal and to take tolls, &c., there was a provision that *it should be lawful* for the Company, if any boat were sunk in the canal, to cause the same to be weighed

and drawn up. The declaration stated, that a boat was sunk in the canal and impeded the navigation, and that the Company did not, within reasonable time after notice thereof, raise the boat, or place any signal or give notice of the obstruction; so that a fly-boat of the plaintiffs ran foul of the sunken boat, and was damaged.

Held, that the clause in question did not impose upon the Company any obligation to raise such boat, but that, by the common law, it was obligatory upon them to take reasonable care that all persons who navigated the canal should do so without danger.

And that such duty and liability might be implied from the facts stated in the declaration, though it contained no actual averment of such duty.

(a) Intituled "An Act for making and maintaining a navigable Canal from Kirkby Kendal, in the County of Westmoreland, to West Houghton, in the County Palatine of Lancaster (with branches)."

the rules, orders, and directions thereafter expressed, and should for that purpose be one body politic and corporate: and the said Company were thereby authorized and empowered to make and complete a canal to be called "The Lancaster Canal," and to be navigable and passable for boats, barges, or other vessels, from, at, or near to, and through the several parishes therein mentioned, and to do all matters and things which they should think convenient and necessary for the making, extending, preserving, improving, completing, and using of the canal and other works as therein mentioned; and that it should be lawful for the Company, from time to time and at all times thereafter, to ask, demand, take, and recover, to and for their own use and behoof, the rates and duties in the act in that behalf mentioned; and that all persons whosoever should have free liberty to navigate upon the said canal, sluices, trenches, or passages with any boats or vessels, not exceeding such lengths and breadths as the locks would commodiously permit, upon payment of such rates and duties as should be demanded by the Company, not exceeding the rates and duties thereinbefore mentioned: and it was also enacted, that if any boat or vessel should be placed or lie abreast or athwart any part of the canal or branches, or of any trench, sluice, or passage belonging thereto, not being moored at both ends, or if any person or persons navigating any boat or vessel should wilfully obstruct the navigation of the canal by means of such boat or vessel, and the person having the care of such respective boat or vessel should not immediately, upon request made, moor the same at both ends, or remove, stop, or effectually secure the same, every person so offending should forfeit certain sums in the act mentioned; and that if any boat or vessel should be sunk in the canal or branches thereof, and the owner or person having the care of such boat, should not without loss of time weigh or draw up the same, *it should be lawful* for the agents or servants of the Company to cause such boat or vessel to be

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weighed or drawn up, and to detain and keep the same till payment were made of all the expenses thereby necessarily occasioned: And whereas also, before and at the time of the committing of the grievances thereafter mentioned, a certain navigable canal, and divers branches thereof, had been and were made and formed, under and by virtue of the powers of the act, and the Company had been and were used and accustomed to take and receive rates and duties, in respect of the passing of boats and vessels in and along the canal and branches thereof, and the plaintiffs then were the owners of a certain fly-boat of great value, to wit, of the value of £1000, and of such a length as the said locks would commodiously permit, wherewith they had been used and accustomed to pass and repass in and along the canal and branches, with goods, wares, and merchandize, as common carriers, paying to the Company such rates and duties in that behalf as were required by the Company, and in and on board of which same fly-boat, at the time of the committing of the grievance hereinafter mentioned, there were divers goods, wares, and merchandize of great value, to wit, of the value of £2000, of and belonging to divers persons respectively, to wit &c., and which same goods were then in the custody and under the care and in the possession of the plaintiffs as carriers, and for the purpose of being safely carried and conveyed by them in and on board of the said boat, for reasonable reward in that behalf: And whereas also, heretofore, to wit &c., a certain boat sank in one of the said branches of the canal, to wit &c., and obstructed the navigation of the canal in the said branch thereof, so that boats and vessels passing in the daytime could with difficulty avoid or pass such obstruction, and boats passing at night and in the dark would be in great danger of running foul of and striking against the same, and neither the owner nor person having the care of the said boat so sunk as aforesaid, did or would without loss of time weigh or draw up the

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same, or remove the said obstruction, but wholly neglected and omitted so to do; of all which premises the said Company, long before the happening of the accident and accruing of the damage hereinafter mentioned, had notice; whereupon it then became and was the duty of the Company, by their agents and servants in that behalf, within a reasonable time after such notice as aforesaid, to cause the said boat so sunk as aforesaid to be weighed or drawn up, and the said obstruction to be removed; yet the Company, not regarding the act of Parliament, nor their duty in the premises, did not nor would, within such reasonable time as aforesaid, cause the boat so sunk as aforesaid to be weighed or drawn up, nor the said obstruction to be removed, nor did nor would cause any light or other signal to be set up or placed, or notice to be given, so as to warn persons steering or guiding boats or vessels in that direction of the said obstruction, by means whereof, and by and through the neglect and default of the Company, their servants and agents, in that behalf, and without any default on the part of the plaintiffs or their servants in that behalf, the said fly-boat of the plaintiffs having on board thereof the said goods, wares, and merchandize, and lawfully and rightfully passing in and along the said branch of the said canal in the said county palatine, and the persons attending in and on board of the said fly-boat, and having the direction thereof, and being the servants of the plaintiffs in that behalf, being unable to see the said obstruction, afterwards, to wit on &c., in the night of the same day ran foul of and struck against the end of the said boat so sunk as aforesaid, and by means thereof the said fly-boat became and was burst, broken, damaged, and spoiled, and the said goods, wares, and merchandize so in and on board of the same fly-boat, then became and were, by reason of the premises, wet, spoiled, damaged, and rendered of no use or value whatsoever, insomuch that, by reason of the premises

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the plaintiffs were put to, and did necessarily incur, great expenses, &c.

Plea—Not guilty.

The cause was tried before *Coleridge*, J., at the Liverpool Summer Assizes, 1836, and a verdict found for the plaintiffs, with leave to the defendants to move to enter a nonsuit; and *Cresswell*, in the following term, having obtained a rule *nisi* in the Court of Queen's Bench accordingly,

R. Alexander, Wightman, G. Henderson, and Tomlinson, shewed cause (*a*).

Cresswell, Armstrong, and L. Peel, contra.

LORD DENMAN, C. J., in Trinity Term, 1838 (*b*), delivered the judgment of the Court.—This was an action on the case against the defendants for negligence in leaving a sunken barge in their canal, which the plaintiffs' vessel ran against and thereby was sunk. The declaration set forth portions of the act, by which the defendants were empowered to make a canal passable for all boats, and to receive tolls for their passage, and to raise such vessels as might be sunk in their canal, if the owners should omit to do so after twenty-four hours: it then alleged a duty in the defendants to keep the canal clear and safe for navigation, and stated that the plaintiffs' vessel was navigating there, using the canal and paying toll to the defendants; and lastly, described the injury sustained from the vessel after the twenty-four hours. The only plea was, not guilty. On the trial before my Brother *Coleridge*, the jury found a verdict for the plaintiffs to the full extent of their loss,

(*a*) May 4th, 1838, Before Lord Denman, C. J., *Patteson*, J., and *Coleridge*, J. See *Parnaby and Others v. The Lancaster Canal Company*, 3 N. & P. 523.
(*b*) June 6th.

but the defendants obtained a rule for entering a nonsuit, according to leave reserved, and we have heard that rule fully argued.

We do not feel the smallest doubt that this action may be maintained. The only one of the numerous cases cited, that appeared to point the other way, is *Harris v. Baker* (a), where trustees of a road were held not liable to an action for a personal injury arising from the plaintiff's wife falling, in the nighttime, over a heap of scrapings, placed on the road side by a defendant, who placed no light to give notice of the obstruction. But that case may be distinguished, as the action was against public officers who derived no benefit from the road. The present defendants, on the contrary, invite the whole public to navigate on their canal in consideration of the tolls paid. They have lawful power to make the canal in all respects fit for navigation, and particularly to remove the kind of obstruction by which the plaintiffs suffered. It is the same in principle as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for that purpose, but which they only, and not the public, had a right to repair, and then left that road in so bad a state that a person's leg was broken when he came to transact business with them there. A more familiar example, and not of very rare occurrence, is that of a shopkeeper who leaves a trap-door open in his shop, and causes a customer to fall down and suffer injury. We think the defendants are certainly liable; it is therefore needless to enter on the other point made as to the effect of the plea of not guilty.

Rule discharged.

Error was brought to the Exchequer Chamber, Tuesday, June 18, 1839, before *Tindal*, C. J.; *Vaughan*, *Bosan-*

(a) 4 M. & S. 27.

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quet, and *Erskine, Js.*; and *Parke, Gurney*, and *Maule, Bs.*

The grounds of error assigned by the plaintiffs in error were, that it is not stated in the declaration that the boat was accidentally or unavoidably sunk; that no duty is expressly alleged by the declaration in the Company, and that no duty by law lay upon the Company to raise vessels sunk in their canal; but that the duty lay on the owners or persons having the care and management thereof, whether the same were accidentally and unavoidably, or through negligence, or wilfully sunk; but although the Company might, under the power of their act, themselves have raised the boat, yet that the omission to do so did not render them liable to an action; that the plaintiffs in the action might have sued and recovered against the owner of the boat; that no liability at common law lies upon the owners of a navigation for injuries occasioned by the neglect or wilful misconduct of persons navigating, over whom they have no control; that the declaration alleges no such common law liability, and that it does not allege or shew forth any statutory liability to the damages laid in the declaration.

The defendants in error contended that it was the general duty of the Canal Company, after having made their canal under the authority of acts of Parliament, to maintain and keep the same open and passable for the use of the public, which general duty is evident from the acts Parliament, and that as long as they undertook to keep the canal open for public use, and induced the public to use it, receiving therefore tolls and profits for their own benefit, they were especially bound, after notice of an obstruction which prevented the public from having the free use of the canal, and which they were fully empowered to remove, to cause such obstruction to be removed in a reasonable time, or to take reasonable precautions to prevent the public from sustaining damage from it, which duty is suffi-

ciently stated in the declaration, and that the breach of it having been the cause of a particular loss to the defendants in error, entitles them to maintain their action for such loss.

Joinder in error.

L. Peel, for the plaintiffs in error.—The declaration is founded upon the 110th section of the act, and the question is, whether any duty arises either upon the act of Parliament or at common law, calling upon the defendants to do what is required of them.—First, the words in the statute are permissive, not imperative; it is not “shall and may,” but “it shall be lawful;” and in all the authorities where any constrained sense is put upon this sort of words, it is when there is something in the subject-matter requiring the common import of the words to be departed from; they do no more than affirm that the import of the word “shall” is not to be lessened by its juxta-position with a word of less stringent quality; and all those cases require that a forced construction should be put on such words, or gross injustice would follow. Thus, in *Dwarrie’s Statutes* (a), the words in 23 Hen. 6, c. 10, are held not to be obligatory. [*Bosanquet*, J.—I think *Allnutt v. English* (b), which was not quoted in the Court below, bears much on this case.] Then again, by 14 Car. 2, c. 12, “*it shall be lawful*” has been considered obligatory, because then a constable being a public officer, and out of pocket by doing his duty, it was thought hard to make his reimbursement depend on the caprice of the churchwardens and overseers. *Rex v. Barlow* (c). It is necessary, therefore, in this case to see whether the statute, where in other sections it enjoins works to be done, uses imperative words, because if in them the language is varied the change must be assumed not to have been made without cause. Now this act uses strong lan-

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(a) Vol. 2, p. 712.

(b) 12 East, 527.

(c) 2 Salk. 609.

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guage where it enjoins any duty, as in sec. 94, *shall* provide watering places; sec. 95, *shall* fence off towing paths; and still stronger in section 96, as to building bridges, where for neglect of that duty “*they shall be liable to indictment.*” There is a similar provision in sec. 97; and this is an important assertion, when applied to the argument that the Company would be liable to indictment, for not doing that which they might have done, when it says they shall be liable in one instance and not in another. If every word is to be taken in an obligatory sense, the liabilities of this and all other similar Companies will be extended much further than was ever contemplated. It is contended that this section creates no obligation or imaginary contract; it gives the Company no more power than they would have had without the act, to remove obstructions to a highway or canal, but that it gives them a right greater than by common law to detain the vessel for expenses. If there is any duty, it must be founded on the relative situations of the Company and the public. Now, unless the argument of liability can be pushed to the extent of indicting, they are not liable to an action for damages; they are dependent propositions; unless, therefore, it can be shewn to be a case of contract, it rests solely on a supposed duty. There is no authority for the position, that the Company applying for these powers can be forced to complete their works. The argument in *Thicknesse v. The Lancaster Canal Company* (a) is of a totally different character. In all the class of cases cited in *Lee v. Milner* (b), from *Blakemore v. The Glamorganshire Canal Company* (c), which is the foundation of the doctrine, downwards, the particular Company were proceeding to do some act by which persons would be injured, and they interfered to oppose it, unless the contract were completed to the full. Even if it were conceded that the Com-

(a) 4 M. & W. 472.

(b) 2 M. & W. 824.

(c) 1 Myl. & K. 154.

pany might be indicted for not completing their canal, it would not follow that they were liable for this accident. The sunken vessel was not their own, and they had had no power of seeing whether or not it was of the proper size, no control over the owners, and no power of guarding against dangers for which they are now sought to be made liable. If they are entitled to toll, and receive it, how do they differ from trustees of a turnpike road? [*Bosanquet, J.*—The distinction is that they take for their own benefit.] There is the same source for raising funds, the same limit as to emoluments, no power of augmenting tolls, and persons lending money on tolls in both cases are in the same situation. The distinction raised at the trial between the cases cited was upon the ground that *Harris v. Baker* (a) was a case of public officers having no interest; that is not a correct principle. There may be a difference when an individual uses his own property to the detriment of his neighbours; but when a Company doing public benefit cause private injury, the question is, have they exceeded their powers or used them oppressively? In *Leader v. Moxton* (b), trustees acting for the public without emolument, were liable in damages for exceeding their power in obstructing light, because there was such a provision in the act. *Jones v. Birch* (c), was a case of Commissioners of Sewers, and it was there held that they were liable, although the work which occasioned the damage appeared to be performed in a skilful manner. That case, therefore, is authority for saying that the circumstance of their not being beneficially interested does not protect them. In *Boulton v. Crowther* (d), the trustees of a turnpike road were held not liable to an action for a consequential injury, resulting from an act which they were authorized to do.

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(a) 4 M. & S. 27.

(b) 3 Wils. 461.

(c) 5 B & Ald. 837. And see the remarks of Lord Tenterden,

C. J., and Mr. Justice Bayley, in the judgment on that case.

(d) 2 B. & C. 703.

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But, assuming the Company to be liable to indictment for not keeping their canal navigable, they are not so by reason of obstructions caused by the act of others. The declaration is as general as the section, which applies to all obstructions, whether occasioned by tempest or other accidental circumstances, or the wilful act of third persons; in any case the vessel is to be raised by the owners, and on their default by the Company. If all omissions are to be treated on the same principle, and they are bound at all events to keep their canal clear, it is no element of inquiry whether they knew of the obstruction or not, they would be equally liable. In indictments for not repairing roads *ratione clausuræ vel tenuræ*, knowledge is no ingredient; if it were, such indictments would contain an averment of knowledge, and there is no instance of inhabitants of a parish, corporation, or other persons, so bound to repair roads, being liable to be indicted for encroachments made, not by themselves but by a wrong doer. There are strong precedents of indictments lying against the individuals causing such a nuisance, but no authority for the position that such inhabitants are liable either to indictment or action. The remedy is by indictment, where the damage is not specific; where it is, by action. Here the Canal Company have a vessel sunk, by an accident over which they had no control, and therefore the act of sinking cannot be attributed to them. The individual who caused it is, no doubt, liable; are there, therefore, two concurrent liabilities by two parties who have nothing to do with each other? [*Bosanquet, J.*—Here the Company had notice.] That makes no difference, unless there was a duty. Therefore, if the mere notice does not create a liability, and there is no duty independent of notice, the two together can form none; you cannot make a liability by ingrafting a moral on a defective legal obligation. The parties are sued upon a duty arising out of the act of Parliament, the judgment of the Court of Queen's Bench is founded upon rea-

sons extrinsic of the act, and does not base itself upon any statute. Lord *Denman* says, "The only case that points against the maintenance of this action is *Harris v. Baker* (a), and the distinction drawn between that case and the rest is as being against public officers who derived no benefit from the road." If, therefore, the cases cited do not draw such a distinction, it is an unsound conclusion. [*Tindal*, C. J.—The consideration that moves the legislature to grant these powers is the benefit to the public of always having an accessible canal.] It is too much to say, that because they invite the public they become insurers; that would extend the liability of carriers to persons not carriers. In every case cited below the act was done mediately or immediately by the party sued: there is no case where the original act was that of third persons, over whom there was no control, and who were not the agents of the party sued. It is contended, therefore, first, that no liability attaches, and if it does, that this is not an obstruction contemplated by the legislature.

R. Alexander, contra.—The liability of the Company arises on one or other of two points. First, without reference to the statute, by the common law, deriving a benefit from the canal, there is a duty imposed upon them that every thing shall be safe, and independently of that, there is here expressly a treaty between them and the public, and a direction to them to do what the enjoyment of the canal requires—keep and maintain it safe and fit for the use of the public. The first proposition is on a general principle of law from the relative situation of the parties, and if an indictment will not lie, an action will. *Wilkes v. The Hungerford Market Company* (b). The public pay tolls as the price of using the canal; the Company receiving that toll have a direct personal interest, and ought to keep it safe. This

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(b) 2 B. & C. 281.

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is an act of nonfeasance, which, causing injury, makes them liable for consequential damages. There are many cases to shew, that where a case of misfeasance occurs, the parties are not protected by being public officers, and this case is analogous to those. In *Leader v. Moxton* (a), they had acted wantonly and oppressively, as is the case here—see also *Matthews v. The West London Waterworks Company* (b). [Parke, B.—The question is, whether they warrant that they will use reasonable care to make it safe, not that it shall be safe.] Every thing has been done to make them liable; they cannot set up want of notice: *Weld v. The Gas Light Company* (c) is a similar case; there no intimation was given of danger, and no precaution taken; so in *Rose v. Miles* (d). [Maule, B.—It seems to me the question should be, whether they were not bound to take reasonable care to warn people; not to take up the barge.] The contrary doctrine would be exceedingly inconvenient. The relative duties of the public and a Company are shewn in *Rex v. The Severn and Wye Railway Company* (e), and *Wilkes v. The Hungerford Market Company* (f); and all the authorities on that head are collected in *Kaye v. Chapman* (g), and shew that it is not because people choose to form themselves into a public Company that they are exempt from the liabilities attaching to individuals.

Secondly, the Company is liable under sect. 110, which seems to have regard, not only to sunken vessels, but their mooring, navigating, &c., where, upon request made and default, penalties are imposed on the individual. In the case of a sunken boat the Company are invested with all the necessary powers, the act gives them every facility, clearly contemplating it to be their duty, and considering it to be the

(a) 3 Wils. 461.

(b) 3 Camp. 403, where Lord Erskine distinguishes between misfeasance and nonfeasance.

(c) 1 Stark. 189.

(d) 4 M. & S. 101.

(e) 2 B. & Ald. 746.

(f) 2 B. & C. 281.

(g) 5 A. & E. 647.

object of the legislature that the canal shall be safely used. The language of the act is of that tenor. It is called, *An act for making, carrying on, &c., and again, for making and using*. Sections 111 and 112 shew the obligations of the Company prospectively, being not for making but keeping: then the Company have an interest, they receive tolls and levy penalties. As to the words “*shall*” and “*will*,” “*shall be lawful*” has been held to be imperative, as the construction to be put on statutes of this description is against the Company and in favour of the public; *Blake-more v. Glamorganshire Canal Navigation* (a), *Scales v. Pickering* (b), *Rex v. The Stourbridge Canal Company* (c); and *Allnutt v. English* (d), goes the whole length of the proposition as to the case of private proprietors clothed with a public right. A company, intrusted with powers for their immediate benefit, are liable for negligent performance of their duties; they avail themselves of their privileges by receiving goods, and then neglect the care of them: public officers have no interest, and it is on that account they are not liable. *Harris v. Baker* (e). The Company, therefore, are liable at common law, and also by the statutory enactments of the 110th section governed by the other sections; and if the statement of the liabilities and duties in the declaration are not sufficiently set out, it is at all events good after verdict.

L. Peel, in reply.—The finding of the jury does not affect the duty laid. If the declaration lays no duty, the facts found either as inducement or breach will not aid it. It is the statement of a fact, not a duty, that is aided by verdict; *Stennett v. Hogg* (f), *Trower v. Chadwick* (g); therefore, unless an allegation in the breach can be taken to extend the

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(a) 1 Myl. & K. 154; and see
Devaine on Statutes.

(b) 4 Bing. 452.

(c) B. & Ad. 793.

(d) 12 East, 527.

(e) 4 M. & S. 27.

(f) 1 Wms. Saund. 228.

(g) 3 B. N. C. 334.

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duty, no judgment can be given on this declaration, as there is no allegation that the Company had the means of removing the obstruction, or of giving notice of it to the owners. It must depend upon the duty as stated in the declaration, or upon the facts alleged there, from which the Court may collect the duty by legal intendment. In all the cases cited on the other side the defendants were held liable for acts done, either by themselves or their servants. The Severn and Wye Company were proceeding contrary to their act to take up their railway, and were therefore committing a fraud by doing something against the act; it is one thing to say a party is not liable to repair, and another, that they are authorized to destroy. Here the original act was that of a wrong doer, where the plaintiffs had no privity or cognizance, and the effect of holding them liable will be to encourage a multiplicity of actions, and expose all Companies to liabilities, from which they could not protect themselves.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—The question raised by the writ of error in this case, on a plea of not guilty, was, whether the declaration disclosed a sufficient cause of action against the Canal Company. It recited several clauses of the 32 Geo. 3, by which the Company were empowered to make and maintain a canal navigable by the public with boats and vessels on payment of tolls; one of those clauses enacted, that it should be lawful for the servants of the Company, if any boat should be sunk in the canal, and the owners should not weigh or draw it up, to cause it to be weighed or drawn up, and to detain it for the payment of expenses. The declaration then proceeded to state that the canal was formed and completed, and that the Company received tolls; that the plaintiffs were navigating the canal with a fly-boat; that a boat was sunk in it and obstructed the navigation, so that boats

could pass with difficulty in the day, and at night were in great danger of striking against the sunken boat; that the owners of the boat did not weigh or draw it up, of which the Company had notice, whereupon it was the duty of the Company, within a reasonable time after such notice, to cause the boat to be weighed or drawn up, and the obstruction to be removed; and the breach assigned is that the Company did not within such reasonable time as aforesaid cause the boat to be raised or drawn up, nor the obstruction removed, nor did nor would cause a light or other signal to be set up or placed, or notice to be given, so as to warn persons steering or guiding boats in that direction of the said obstruction, by means of which, and by and through the neglect and default of the Company in that behalf, and without any default in the plaintiffs, the fly-boat of the plaintiffs, being rightfully passing along the canal, and the persons on board of it being unable to see the obstruction, in the night, ran foul of and struck against the boat which was so sunk, by reason whereof the fly-boat, with the goods on board, was damaged. The principal objection in this case was, that the clause recited in the declaration, and which is therein stated to have cast a duty on the Company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or permissive clause only; and we are all of the opinion, that neither the clause recited, nor anything in the act of Parliament contained, imposes such a duty on the defendants below: and the allegation in the declaration as to the duty of the Company, seems to have been founded on a mistake as to the true meaning and effect of that clause. But admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this Company, and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at

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all, or if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the indictment shew that the Company made the canal for their profit, and opened it to the public upon the payment of tolls to the Company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstruction, but to take reasonable care, so long as they keep it open for the public use of all who choose to navigate it, that they may do so without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the Company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shop-keeper, who invites the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injury. The declaration, it is true, contains no averment of such a duty, which it need not do, nor any allegation, in express terms, of a breach of such duty; but the question still is, whether the facts alleged do not necessarily imply that there was a breach of that duty. We have felt some doubt on this point, but, on consideration, we think that in substance such breach of duty is sufficiently assigned.

It is averred that the Company had notice of the obstruction by the sunken boat, that they did not within a reasonable time as aforesaid (that is, within a reasonable time *after such notice*) either weigh up the boat, or remove the obstruction in any other way, or do that, which, in the event of their choosing to do neither of those things, they certainly ought to have done, if they had used reasonable care to prevent accidents, namely, either place a signal, or give some notice to those who were navigating in that part of the canal. The allegation, that they neither removed the obstruction, nor gave actual or constructive notice of it,

amounts to an allegation of a breach of their common law duty, to take reasonable care to prevent mischief by the obstruction; and the allegation, that they did not do so within a reasonable time after notice, is equivalent to a statement that a reasonable time had elapsed to have enabled them either to remove the obstruction, or give such notice of it. On this ground we think that there is a good breach of a common law duty, and that the declaration may be supported, and consequently that the defendants in error are entitled to our judgment.

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Judgment affirmed.

COURT OF EXCHEQUER.

In Michaelmas Term, 1839.

Between WAINWRIGHT - - - Plaintiff,
and
RAMSDEN - - - Defendant.

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Nov. 25th.

The defendant was tenant from year to year of premises, which he occupied at a rent payable half-yearly, viz. on April 1st and October 1st. On the 28th of January, 1838, he received from a Railway Company (under the powers of their act) notice to quit at the end of six months, and on the 28th of July he gave up possession to them without applying for or receiving compensation for his interest in the premises, to which he was entitled by the act.

Held, that he was liable to his landlord for the rent up to October, 1838.

THIS was an action brought to recover the sum of 7*l.* 10*s.*, being a half-year's rent due October 1st, 1838, for the use and occupation of certain premises at Wakefield held by the defendant as a yearly tenant at the rent of £15 per annum, payable half-yearly on the 1st of April and 1st of October. The premises being required for the purposes of the Manchester and Leeds Railway Act, (7 Will. 4, c. cxi), and being included in the schedule to that act, the Company on January 28th, 1838, gave him six months' notice to quit. At the expiration of the six months, he delivered up possession to the Company without applying for or receiving compensation, to which he was entitled by the act; and it was contended, that, under these circumstances, he was not liable for all or any part of the rent of the premises, for the half-year from April to October, 1838.

By the 7 Will. 4, c. cxi, s. 146, it is enacted, that all persons in possession of any lands, which shall be required or be intended to be taken or used for the purposes of this act, and who shall have no greater interest than as tenants from year to year, (inter alios), shall deliver up possession of such property to the said Company at the expiration of six calendar months next after notice to that effect shall have

been given by the Company, whether such notice be given with reference to the time of the commencement of such tenants' holding or not: the sheriff being required, in case of refusal, to deliver possession accordingly.

And, by the 147th section, it is enacted, that in case any such tenant shall, according to the true intent and meaning of this act, be entitled to compensation, the Company are hereby required to make or tender to such tenant, before they shall issue their precept to the sheriff to give such possession, satisfaction, recompense, or compensation for the value of his unexpired term or interest in the said premises, or any other loss, damage, or inconvenience for which compensation is hereby directed to be made.

At the trial before the assessor to the sheriff of Yorkshire, the jury, under his direction, found a general verdict for the defendant. *Baines*, in this term, having obtained a rule *nisi* for a new trial on the ground of misdirection,

Wightman now shewed cause (a).—The question is, whether there has been here an eviction by title paramount, or a determination of the tenancy by act and operation of law. The general rule of law is, in the case of an eviction where rent is payable half-yearly, the tenant is not liable to his landlord. *Smith v. Rawlins* (b); *Burn v. Phelps* (c); *Grimman v. Legge* (d). [*Parke, B.*—An eviction by title paramount acts by way of punishment to the lessor for demising without title; this is by act of law.] Here the tenant's interest is compromised, as his landlord could not give such a notice. He has, therefore, no right to be called upon either for the half-year's rent or even for a proportionable part of it for the occupation up to July 28th, when he was evicted by the

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(a) Before Lord *Abinegr*, C. B.,
Parke, B., Anderson, B., and Rolfe,
B.

(b) 3 Camp. 513.
(c) 1 Stark. N. P. C. 94.
(d) 8 B. & C. 324.

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Company, from whom he would get no compensation for so minute an interest.

Baines, contra.—There is a distinction between an eviction by the act of the landlord, or by a person of whose title he is supposed to be cognizant, and a case where there is no fraud or laches, and he cannot help himself. In Bacon's Abridgment, *Rent* (M) 2 (a), it is laid down, that it is reasonable that if the use of the thing demised be interrupted or taken away from the tenant, without his default, the rent ought to be abated or apportioned. Here it is not pretended that there was any laches; there was a beneficial occupation by the tenant up to July 28th, and he was under no compulsion to go out then unless compensation was tendered. There is no proof but that he gave up the key to the Company, which would be consistent with a mere fraud to defeat the claim of the landlord; and, in the face of all this, the jury found a general verdict for the defendant.

LORD ABINGER, C. B.—This rule must be absolute. The defendant, for anything that appears to the contrary, might have remained in until October; or, at least, would have been entitled to compensation under the act. It is clear, that, up to July the 28th, the landlord ought to be paid; there has been notice, his name being put in the schedule of the act, which transfers the taking from him to the Company.

Rule absolute.

(a) Vol. 7, p. 29, 7th ed.

COURT OF QUEEN'S BENCH.

In Easter Term, 1839.

THE QUEEN
against

THE LONDON AND SOUTHAMPTON RAILWAY COMPANY.

1839.

May 1st.

IN Michaelmas Term, 1837, *Channell* had obtained a rule *nisi* for a *mandamus*, commanding the Company to issue their warrant to the sheriff of Surrey to summon a jury for the purpose of assessing the sum to be paid by way of compensation to Messrs. Francis & Sons, for the purchase of their interest in certain premises taken by the Company under sections 47 and 48 of their act, (4 & 5 Will. 4, c. lxxxviii), and, also, for the damage sustained by them on account of their having been compelled to give up their premises.

It appeared from the affidavits, that Messrs. Francis & Sons were tenants from year to year of the premises in question; that their tenancy commenced at Christmas; that they expected to be allowed to continue tenants, and, under such expectation, had expended money in improving the premises. On the 10th January, 1837, they were served with the following notice:—

they should be entitled to compensation. The Company in January gave notice as above to a yearly tenant; they afterwards purchased the landlord's interest, and, finding that the tenancy commenced at Christmas, they gave notice to the tenant that the premises would not be required till the Christmas following, and he continued in possession accordingly until and after that period.

Held, that the tenant had no interest for which the Company were bound to make him compensation, the premises not having been given up in pursuance of the notice under the act.

By a Railway Act it was provided that tenants from year to year, and other persons in possession of lands required for the purposes of the act, should deliver up possession of such lands to the Company six months after notice to that effect, without reference to the time of the commencement of their term, and that, if they should be required to deliver up possession before the expiration of their term or interest therein,

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“ I do hereby, on behalf of the London and Southampton Railway Company, give you notice that all that piece or parcel of ground, (describing the premises), will be wanted and required for the purpose of the said act, and I hereby, on behalf of the said Company, give you notice to deliver up the possession thereof to the said Company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months after this notice: and I further give you notice that the said Company are willing to give you compensation for any unexpired term or interest you may have in the said premises at the end of six calendar months from this notice, and that if, for the space of ten days next after the service hereof, you shall neglect or refuse to treat, or shall not agree with the said Company for the amount of such compensation, the said Company will, by virtue of the powers and provisions of the said act, issue a warrant, under the common seal, to the sheriff of the said county of Surrey, or, if necessary, to one of the coroners of the said county, commanding him to return a jury to inquire and give a verdict for the sum or sums of money to be paid to you for such compensation.

“ WILLIAM REED, Secretary.”

At the expiration of the six months the Company demanded possession of the premises and refused compensation; but, on finding the tenancy of Messrs. Francis & Sons had commenced at Christmas, they were allowed to remain in possession until the Christmas following, when the Company would be entitled take possession without compensation, they having purchased the landlord's interest in the property, and become themselves the landlords. Accordingly, at Christmas, 1837, possession was regularly demanded and refused.

By the 4 & 5 Will. 4, c. lxxxviii, s. 47, it is enacted, “ That all tenants at will, lessees for a year, tenants from year to year, and other persons in possession of any lands

which shall be intended to be taken or used for the purposes of this act, and who shall have no greater interest in the lands than as tenants at will, or lessees for a year, or as tenants from year to year, shall respectively deliver up the possession of such lands to the said Company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after notice to that effect shall have been given by the said Company to such respective tenants, or lessees or persons in possession, or left upon the said lands, (whether such notice be given with reference to the time of the commencement, of such tenants' holding or not, and whether such notice be given before or after the said lands shall be purchased by the said Company, or at such time after the expiration of six calendar months from the giving or leaving of such notice, as they shall be respectively required); and in case any such tenant, lessee, or person in possession, shall refuse to deliver up such possession as aforesaid, it shall be lawful for the said Company, under their common seal, to issue their precept to the sheriff of the county in which the lands shall be situate, to deliver possession thereof to such person or persons as shall in such precept be nominated to receive the same: and the said sheriff is hereby required to deliver possession of the said lands accordingly, and to levy and satisfy such costs as shall accrue by or on account of the issuing and execution of such precept on the person so refusing to deliver possession, by distress and sale of his goods and chattels."

And the 48th section enacts, "That where any such tenant or lessee shall be required to deliver up the possession of any lands, so occupied by him, before the expiration of his time or interest therein, the said Company shall, and they are hereby required to make a tender to such tenant or lessee, before they shall issue their precept to the sheriff to give possession of the lands in the occupation of such tenant or lessee, satisfaction or compensation for the

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value of his unexpired term or interest in the said premises, which satisfaction or compensation, in case of difference, shall be ascertained and determined in the same manner as any other satisfaction or compensation for any lands to be taken or used under the authority of this act, is, by this act, directed to be made or determined."

Sir *J. Campbell*, Attorney-General, and *M. D. Hill*, shewed cause (a).—The applicants are not entitled to compensation, they have not been compelled to quit their premises in consequence of the first notice by the Company, for they received a counter notice, stating that their premises would not be required. [*Coleridge*, J.—Cannot they claim compensation for the remainder of the term which they held under their landlord?] No, for they remained in occupation until long after the period fixed by the first notice had expired, and, in fact, until after the expiration of their term; therefore they have suffered no injury, and can have no claim on the Company. The case of *Rex v. The Liverpool and Manchester Railway Company* (b) must govern this, the language of the two statutes being similar. There the Company gave notice to a tenant whose lease had been several times renewed for seven years, and who, at the last renewal, had been assured by his landlord that he should not be turned out at the end of the seven years. During that time the landlord died, having sold his reversion to the Company, and the Court held that the tenant had no interest beyond his term, for which the Company were bound by their act to make him compensation. The cases relating to compensation by the Hungerford Market Company (c) do not apply to this, for they were decided under an act (d) which gave compensation "for loss, damage, or injury, in respect of any interest whatsoever for good-

(a) April 16th, before Lord Denman, C. J., Little-
dale, Patte-
son, and Coleridge, Js.

(b) 4 Adol. & Ell. 650.

(c) 2 B. & Adol. 341.

(d) 11 Geo. 4, c. lxx, s. 19.

will, improvements, tenants' fixtures, or otherwise," which words are much more comprehensive than those of this statute.

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Jervis and Channell, contra.—The sole question here is not upon the merits, but upon the construction of the act. The applicants have a right to have their case sent to a jury, and then they will apply themselves to shew they have a good claim to be compensated. In the cases *Ex parte Farlow* (a), *Ex parte Still* (b), and *Ex parte Gosling* (c), compensation was given for the respective interests the tenants had in the premises. There is no claim here for the chance of a renewal, but because the tenants are disturbed by the Company sooner than they could have been by their landlord. Although they did not quit in pursuance of the notice, yet they are entitled to the benefit of it, *Ex parte Davies* (d), and may have suffered injury from receiving it; as they might have laid out money in improvements, and have conducted their business in a different way, in the expectation of their tenancy being continued, if the notice had not been given.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This was a rule for a *mandamus* to obtain compensation under the 47th and 48th sections of 5 Will. 4, c. lxxxviii, establishing the Southampton Railway. The language of those sections is substantially the same as that of the act establishing the Liverpool and Manchester Railway Company (e), and the case of *Rex v. The Liverpool and Manchester Railway Company* (f), is a strong authority upon the subject. In that case the claimants held under a lease for seven years, having a reasonable expectation of

(a) 2 B. & Adol. 341.

(b) 4 B. & Adol. 592.

(c) Id. 596.

(d) Id. 327.

(e) 7 Geo. 4, c. xlix.

(f) 4 Adol. & Ell. 650; 6 Nev. & M. 186.

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renewal, but no covenant or agreement to that effect. The Company gave a six months' notice under the act, which expired at the same time as the term of seven years; and it was held that the claimants had no right to any compensation. Here the claimants were tenants from year to year, commencing at Christmas. The Company, in January, 1837, gave a six months' notice under the act, supposing, erroneously, that the claimants held from Michaelmas. On discovering the error, they gave notice that the premises would not be wanted till Christmas; the claimants did not quit in July, nor indeed at Christmas. At the time of the notice in January, the Company had not purchased the landlord's interest, but they did so before they gave notice that the premises were not wanted till Christmas. Now, if the claimants had quitted in July, they would undoubtedly have been entitled to some compensation; but as they have chosen to hold over beyond Christmas, at which time they might have been compelled to quit by the ordinary landlord's notice, without compensation, it was said that they are not entitled to anything. On the other hand, it is contended, that the tenancy has never been determined, because no regular landlord's notice was given; that the situation of the tenants was materially altered by the six months' notice given in January, and their possession rendered wholly uncertain from day to day after the expiration of those six months. We cannot think that the act of Parliament requires two notices in the case of a tenancy from year to year; but the true construction is, that the Company might either give the ordinary landlord's notice, ending with the current year of tenancy, in which case no compensation would be due, or six months' notice under the act, to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compen-

sation, the premises must be given up. If, as in this case, the Company inform the tenant that he may hold them till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession. It makes no difference that the Company were not landlords when they gave the notice in January; that notice was undoubtedly meant to operate under the act, and would have done so, but for the subsequent conduct of the parties. Under these circumstances, we are of opinion that this rule must be discharged.

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Rule discharged.

COURT OF QUEEN'S BENCH.

*In Hilary Term, 1840.*THE QUEEN
against

THE LEEDS AND LIVERPOOL CANAL COMPANY.

1840.

Jan. 14th.

By a Canal Act, (10 Geo. 3, c. cxiv), the Company were required to enrol with the clerk of the peace all conveyances, &c., relating to the purchase of lands taken by them for the purposes of their act. On an application for a *mandamus* to compel them to enrol a conveyance executed more than sixty years since:—*Held*, that they could not be called upon, after so many years, to do so.

IN Trinity Term, 1839, *Cresswell* had obtained a rule *nisi* calling upon the Company of Proprietors of the Canal Navigation from Leeds to Liverpool, to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to enrol with the clerk of the peace for the county of Lancaster and the town clerk of the borough of Liverpool in the said county, as the case might require, all contracts, agreements, sales, conveyances, and assurances relating to the purchase, sale, or disposition, for the use of the said navigation, of any lands or grounds theretofore forming part of the estate of Joseph Scarisbrick, Esquire, deceased, and of Charles Scarisbrick, Esquire, or either of them.

The affidavits stated that the said Charles Scarisbrick is the owner of an extensive landed estate in the county of Lancaster, through which the Leeds and Liverpool Canal has been cut and made, under the authority of an act 10 Geo. 3, c. cxiv, and certain subsequent acts, and that the land now formed into the said canal formerly, and before the making thereof, belonged to one Joseph Scarisbrick, deceased, and that the said Company of Proprietors purchased,

took, and had, by means of some contract, agreement, sale, conveyance, or assurance in writing, the said land now formed into the said canal, under the power of the said statutes, and for the purposes contemplated and intended therein, the said land now formed into the said canal as aforesaid, and the said landed estate, before and at the time of such purchase forming and being one landed estate.

That by the said statute it is enacted, that after any such parts of the said lands or grounds shall be so set out and ascertained for making the said cut or canal as aforesaid, roads, ways, and other the purposes and conveniences hereinbefore mentioned, it shall and may be lawful for every person or persons who are or shall be seised, possessed of, or interested in any lands or grounds which shall be so set out and ascertained as aforesaid, or any part thereof, to contract for, sell, and convey unto the said Company, or to such person or persons as they shall nominate and appoint, for the use of the said navigation, all or any part of such lands or grounds which shall from time to time be so set out and ascertained as aforesaid; and where by making the said cut or canal the property of any land-owner shall be separated into small parcels, so as to render the occupation thereof inconvenient, by and with the consent of the commissioners to be appointed as hereinbefore mentioned, or any five or more of them, to be testified by any writing or writings to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, to contract for, sell, and dispose of, or to convey in exchange or in lieu of other lands, all or any part of such lands or grounds through which the said intended cut or canal shall be made, to any person or persons whomsoever, for such price or prices in money, or other equivalent, as to the said commissioners, or any five or more of them, shall seem reasonable; and that all such contracts, agreements, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law, statute, usage,

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or custom to the contrary thereof in anywise notwithstanding; and that all such contracts and agreements, sales, conveyances, and assurances, other than those which concern any purchase or exchange between any such respective land-owners, (so to be made as aforesaid), shall at the expense of the said Company of Proprietors be enrolled with the registrar of the West Riding of the said county of York, the clerk of the peace for the said county of Lancaster, and the town clerk of the borough of Liverpool aforesaid, respectively, as such contracts, agreements, sales, conveyances, and assurances may relate to any lands or grounds within the said counties and borough respectively, and as the case shall require, and true copies thereof shall be allowed to be good evidence in all Courts whatsoever.

That, on the trial of a cause in Her Majesty's Court of Exchequer, wherein the said Charles Scarisbrick was plaintiff and the said Company defendants, which stood for trial at the assizes held at Liverpool, in August, 1838, it was material to give in evidence copies of any contracts and the like as aforesaid, and that the office of the clerk of the peace for the county of Lancaster was searched, as the proper place for the enrolment of such contracts, but that no enrolment of any contract, agreement, sale, conveyance, or assurance, of or relating to the said land now formed into the said canal, was discovered.

That notice was thereupon served upon the Company to enrol the same with the clerk of the peace, but that demand not being complied with, the said C. Scarisbrick was compelled, at much additional expense and inconvenience, to supply from other sources secondary evidence of the facts which such contracts, agreements, sales, conveyances, or assurances would have furnished, if the same had been duly enrolled pursuant to the provisions of the said act.

That the lands aforesaid were purchased and taken, and the said cut or canal in and through the said lands was made and completed in or prior to the year 1774, and has

been navigable ever since; and that the said Company have ever since that time, that is to say, for the space of sixty-five years at the least last past, been in the quiet and uninterrupted possession and enjoyment, and are for the purposes of the said act of Parliament owners of the land so purchased and taken for the purposes of the said navigation. That at this distance of time it is extremely difficult to ascertain in what particular cases the said Company did enter into written contracts for, or take written assurances of lands so purchased by them, or to identify the various portions of land taken by the said Company from the various proprietors thereof for the use of the said navigation, and that ever since the time when the said cut or canal was so completed, being a period of at least sixty-five years, no application was ever made to the said Company to enrol any contracts &c. until the service of the notice hereinbefore mentioned.

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Sir *F. Pollock*, *Atcherley*, Serjt., *Wightman*, and *Baines*, shewed cause (a).—This is a rule commanding the Company to enrol all contracts relating to the purchase of lands of Joseph Scarisbrick. This navigation was established under an act passed in the year 1768, (10 Geo. 3, c. cxiv), since which various acts have amended its provisions and extended the powers of the Company. Section 7 requires such conveyances to be enrolled, and the answer is that there has been no land acquired by the Company with reference to any person named Scarisbrick, whose descendants make this application, during a period of more than sixty-five years, and the Company are challenged with respect to lands, to which they have an indefeasible title by having been in possession sixty years, and cannot be called upon by any court of law or equity to produce a single deed or

(a) Before Lord *Denman*, C. J., *Littledale*, and *Coleridge*, Js.

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conveyance. This ought to be an answer to the application. It is true there is a clause in the original act that conveyances shall be enrolled, but that must be in reasonable time; a man must not remain quiet for sixty-five years, and then call upon the Company, at their expense, to enrol. [Lord Denman, C. J.—He does not bring deeds for you to enrol, but says “you have deeds and must enrol them.”] He should have come while the witnesses were alive, so that the enrolments could be made; there are no deeds except where the witnesses are dead. It is the practice of the Court of Chancery not to enrol deeds unless the witnesses make affidavits, and the form of the enrolment imports that the party asserts a fact, and the witnesses vouch for it. Then it does not sufficiently appear from the affidavits that there has been a sufficient demand stating the object the party has in view. *Rex v. The Wilts and Berks Canal Company (a)*.

Cowling, contra.—In a recent trial, the applicant was put to great expense to prove these lands belonged to his ancestor; and he has no other remedy to establish rights, to which he is entitled under the act as proprietor of such lands, as by section 48, which allows him to take manure. The Company rely on their own wrong. They have, by section 7, a right to purchase land on certain terms, one of which is enrolment, which may be made at any time. They have neglected to do this, and we call upon them to do it now; and there is no limitation of time for a *mandamus*. *Rex v. Stainforth and Headly Canal Company (b)*, and *Rex v. The Cockermouth Inclosure Commissioners (c)*.

LORD DENMAN, C. J.—If the Company have the deeds,

(a) 3 Adol. & Ell. 477.

(b) 1 M. & S. 32.

(c) 1 B. & Adol. 378.

they ought to produce them, otherwise, after so great a lapse of time, I do not see they can be called upon to give any account of them.

LITTLEDALE, J.—Sixty years is a sufficient title in other cases, and ought to be a bar to such an application as this.

COLERIDGE, J., concurred.

Rule discharged.

THE QUEEN
against

THE NORTH UNION RAILWAY COMPANY.

1840.

Jan. 22nd.

SIR W. FOLLETT had obtained a rule *nisi* for a *mandamus* to the North Union Railway Company, commanding them to issue a warrant under their common seal to the sheriff of the county palatine of Lancaster, or other person, according to the provisions of the statute (4 Will. 4, c. xxv), for forming the said Railway Company in that behalf, commanding the said sheriff or other person to impanel, summon, and return a jury according to the provisions of the said statute, to inquire of, assess, and give a verdict for the sum of money to be paid by way of satisfaction or compensation for the damages sustained by Joseph Rylands and others, or any of them, the owners and occupiers of certain lands and premises in the county of Lancaster, in the execution

By a railway act it was provided, that all parties with whom the Company might have any dispute should, at their own cost, before the Company should be obliged to issue their warrant to summon a jury, enter into a bond to prosecute their complaint and pay their proportion of costs; and in case the warrant should be issued without such bond hav-

ing been entered into, the Company might give notice, requiring the same to be done before commencing the inquiry. Certain premises having been injured by floods occasioned by the Company's works; on an application by the owners for a *mandamus* to summon a jury to assess damages, it was objected that the damage resulted from acts done partly by the Company, and partly by the applicants themselves: and that the bond required by the act had not been entered into previous to the application. It did not appear that there had been any demand and refusal.

Held, that there was sufficient doubt on the facts to warrant the issuing of a *mandamus*, and that the entering into the bond, unless required by the Company, was not a condition precedent to such an application.

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by the said Company of the powers granted by the said act, and for the further temporary or perpetual, or for any returning damages that they may sustain, by the means aforesaid.

The affidavits stated, that the said Joseph Rylands and others are co-partners in trade, and are the owners and occupiers of a cotton-spinning factory, bleach-grounds, and chemical and dye works, situate in Wigan, which bleach-grounds adjoin a portion of the North Union Railway.

That in execution of the powers of the statute 4 Will. 4, c. xxv, intituled, "An Act for uniting the Wigan Branch Railway Company and the Preston and Wigan Railway Company, for authorizing an alteration to be made in the line of the last-mentioned railway, and for repealing, altering, and amending the acts relating to the said railways," one part of a certain railway, called the North Union Railway, has been made to run through and pass over what theretofore was a portion of the said bleach-grounds, and within about one hundred yards of the said bleaching and chemical works: and that the said copartners have suffered, and are still suffering, considerable loss and damage, in consequence of the Company making and maintaining the North Union Railway without sufficient drains, watercourses, or other means, whereby to protect the lands, bleach-works, dye-houses, reservoirs, steam-engines, boilers, out-buildings, and premises, from damage by water and otherwise.

That part of the railway which adjoins the said premises passes over an extent of sixty Cheshire acres of land, (each of such acres being more than double a statute acre), and is higher than the said bleach-ground and works; that in the event of a greater than ordinary fall of rain, the railway, being a deep cutting, acts as a channel down which the water runs, and empties itself upon the bleach-grounds, at a point where the railway comes upon a level with the adjoining surface, and from thence the water runs into the

dye-house and chemical works, which lie still lower than the bleach-grounds, and also empties itself partially at another part of the cutting into Barley Brook, which runs into the reservoirs aforesaid.

That after the Company had commenced making their railway near the bleach-works, complaint was made to them of clay and sand, mixed with water, flowing from the railway into the reservoirs; and notice was given to them, that, unless they formed a bank, or used other means to prevent the water and filth from flowing into the works, great injury would result.

That this evil might be remedied or prevented, by the Company causing to be cut a sufficient sluice or watercourse on the side of the railway, by which the overflow of water might be carried into the brook, which flows near to and below the works, and into which there is a very ample fall for that purpose: but the Company have not cut any sufficient sluice or watercourse, by which to carry away the overflow of water, in consequence of which the damage complained of has arisen, and the same or similar damage may arise in future, from time to time, in consequence of the imperfect construction of the road as regards the said works.

That there is a dye-house at the said works, in which a great number of vats are sunk and filled with indigo, there are bleach-rooms and chemical works, in which yarns are washed and prepared for bleaching, all of which places lie lower than the railway, and are situate at the bottom of the bleach-croft; and that on the 6th of July, 1838, a great quantity of water came down the railway from the higher part of the road, and swept into the said bleach-croft, carrying with it into the brook below a very considerable number of bundles of yarn which had been laid out to bleach on that croft, and also filled the dye-house, and bleach and chemical houses to a depth of four feet from the floors, above the tops of the vats of in-

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digo, and above the ashes, plants, and chemical cisterns which were there, and the effects and property therein were totally spoilt or much damaged; and it was necessary, in order to let the water escape, to break several large holes through the walls of the said buildings; that the Company have turned their drains into two ancient drains in the bleach-croft, which were intended only for agricultural purposes, and so overcharged them, that they broke up through the surface of the land, and threw up water and sand upon the surface of the bleach-croft, and have rendered it totally unfit for use; and that they have lately cut a drain along both sides of the railway, one of which crosses it at a point about twelve yards distant from one of the lodges or reservoirs, and both empty themselves and their filthy water into that reservoir, and render it comparatively useless for the purposes for which it was designed, namely, for the lodgment of pure water for the purpose of fine bleaching.

Notice of the above injury and damage, with a demand of payment in compensation, and in default of such payment, a request to issue a warrant for the summoning a jury to assess the damages so sustained as aforesaid, were served on the Company, May 23rd, 1839.

Affidavits of the Company in answer stated, that much care and circumspection had been used in the designing, making, and constructing of the railway, with a view to the drainage and protection of adjoining lands, and preventing, as far as practicable, the impounding and detention of water, or the diverting of it from its ancient and legitimate channels; that the water was made to empty itself into the brook at the point above mentioned by arrangement and agreement with the said Messrs. Ryland, and that the flow of water into the under-ground drains was caused by their making an opening into the same for the purpose of admitting the water from the cutting to flow into it, and from thence into the brook, and that the water found its way into the vats

and indigo-room by reason of its having overflowed its banks, which was occasioned, partly by the impediment made by a culvert there built in the passage of the water, and partly by reason of its being held up by the lower weir, which has been raised to its present level by the Messrs. Ryland, and that when in the said indigo room, it was impounded by a dead wall also built by them along the side of the stream where formerly there was a free and open access for any water which might overflow the banks of the brook; that the rain and flood which took place in and near Wigan on the 6th of July, 1838, was much greater in suddenness of rise and extent than any in the experience of the deponents; so much so, that in places where water was not wont to lie, it did, on that occasion, rise and lie to the height of several inches upon the surface, and that the nature of such flood was matter of public notoriety.

That a writ of summons was issued on the 12th of October, 1838, at the suit of the said co-partners against the Company, to which an appearance was entered, that that action was never discontinued, but was pending at the time the notice to summon a jury was served as aforesaid.

And that the said copartners, with two sufficient sureties, have not entered into the bond required by the 72nd section of the act to be entered into before the said Company are obliged to issue their warrant for summoning a jury.

By the 4 Will. 4, c. xxv, s. 72, it is enacted that all partners with whom the said Company shall have any dispute, shall at their own costs, before the said Company shall be obliged to issue their warrant for the summoning of such jury, enter into a bond with two sufficient sureties to the said Company, in a penalty of one hundred pounds, to prosecute their complaint, and to bear and pay their proportion of the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses in case any part of

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such costs and expenses shall fall upon them; or in case the said Company shall have thought fit to issue such warrant without such bond having been previously entered into, it shall be lawful for the said Company, in the said notice of the time and place at which such jury are to be returned as aforesaid, to serve as aforesaid, to give notice that a bond in the said penalty of one hundred pounds, with two sufficient sureties, conditioned to bear and pay their proportion of the costs and expenses aforesaid, will be required to be entered into by the said parties to the said Company, before the said inquiry is commenced; and thereupon, unless such bond be given, the said parties so in dispute with the said Company, shall not be allowed to be heard, or to produce any witnesses at, or to take any part or share in the said inquiry.

Cresswell and *Crompton* now shewed cause (a). When this railway was in progress, some fresh springs were found, of which the claimants were glad to avail themselves, in order to obtain the benefit of the additional water; for this purpose they opened the old drains, and other parts of the works were made by their desire and consent. The brook in question operated as a drain to the whole sixty Cheshire acres spoken of in the affidavits, and all the water now runs into it; therefore no more water can flow now than before, and it is not pretended that any damage can accrue from it, unless in the case of very extraordinary floods; and if damage has been sustained from such causes, and under such circumstances, are the Company to make compensation for it? If a *mandamus* issues, it must be for something done under the powers of the act; and although damage has been done by the works, yet those works were made by the desire of the persons making this application,

(a) Before Lord *Denman*, C. J., *Littledale*, *Williams*, and *Cole-ridge*, Js.

and who have themselves stopped up one of the drains. That is an answer to the application for a *mandamus*; and besides this, they have commenced an action at law for the damages occasioned by these works.

But supposing they have a right to compel the Company to make compensation, there is a preliminary objection to their proceeding in this case, that they have not entered into the bond required by section 72; and it is no answer, to say they have merely neglected to comply with this, because it is a condition precedent which they are bound to perform, just as much as in the case of any other contract. Though there may be general or special reasons for refusing compensation, neither of them is ground for dispensing with the rule of pleading, which compels plaintiffs to aver the performance of such conditions precedent, and gives defendants an opportunity of traversing them. The Court will not grant a *mandamus* unless there has been a performance by the applicants of what they were under legal obligation to do at that time, nor to perform an act conditionally.

Sir *W. Follett* and *Cowling* contra.—There is no objection to a *mandamus* being issued in this case, for it is not necessary for parties to enter into these bonds before an application to the Court. The bond is not a preliminary step to the application, but to the issuing of the warrant, for it is possible that the Court may decide that no warrant shall issue at all; and in most railway cases no bond is required, especially where the parties are known to be respectable. The Company may issue their warrant without it, or they might have required it before the hearing of this case. The proper course is this—A party says “I claim compensation; I cannot bring an action, because the act points out the course to be pursued, therefore I require you to issue a warrant.” If the Company say in answer, “Enter into the bond, and we will execute the warrant,”

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and the other party then refuses, he cannot ask for a *mandamus*, but if there is nothing said about the bond, he is not deprived of his right to do so; the warrant is to be issued, not on the bond being entered into, but on the bond if required. [*Coleridge, J.*—Suppose no cause had been shewn, a *mandamus* granted, and they had returned that no bond was given?] It would be no answer; it is a discretionary power, and unless demanded is not necessary. But that is not the case here. The Company have appeared, and are before the Court; the applicants are ready and willing, and have never refused to execute a bond; but they put their objection on another ground than the want of a bond, and say that this is not a case within the act; for that is distinctly the effect of these affidavits. If the Company meant to rely on the want of the bond, they ought to have said so; if they are silent on that point, they have no right afterwards to set it up. When a person entitled to a lien on goods, says he is entitled to them on another ground, he waives his lien, and cannot afterwards make that claim. There is no distinction between this and *certiorari*, in which case the act requires recognisances, but they are not entered into beforehand, the rule is that the writs shall issue if recognisances are entered into (a). So here this rule may be issued, but made to remain in Court till something is complied with by the parties, that is, the *mandamus* may issue on a bond being given if required. As to the merits, that is not a question to be tried here. [Here they were stopped by the Court.]

Lord DENMAN, C. J.—We think there is enough doubt to require a return as to the facts. It is not denied that

(a) By 5 Geo. 2, c. 19, s. 2, it is enacted, That no *certiorari* shall be allowed to remove such judgments and orders, unless the party

prosecuting such *certiorari* before the allowance thereof, shall enter into a recognisance to prosecute to effect.

acts injurious to the parties have been done, but are said to have been with their consent; this must be investigated, as we have no opportunity of inquiring into it. Therefore, we think this writ ought to go, if the preliminary objection does not prevent it; as to that we will consider.

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Cur. adv. vult.

Lord DENMAN, C. J.—We think the preliminary objection ought not to prevail.

Rule absolute.



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ACCOUNT.

See PLEADING, 1.

ACQUIESCENCE.

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1. Whatever may be the equity of a plaintiff with regard to the enforcement of a contract, if, after he is well aware of his alleged right, he has by his conduct led the other party to believe that he had no intention to enforce a performance of the contract, the Court will not interfere on his behalf by injunction. *Greenhalgh v. The Manchester and Birmingham Railway Co.*, 68

2. A Railway Company erected near to the premises of the plaintiff certain ovens for the making of coke for working their locomotive engines, and commenced using such ovens in the month of April, 1838. In the month of August following, (some correspondence having taken place in the meantime), the plaintiff filed his bill, complaining of nuisance arising from the use of the ovens, and praying an injunction to restrain the same.

Held, that the jurisdiction of the Court of Chancery in such a case exists for the purpose of protecting a

legal right, and is not an original jurisdiction; and that, no reason being shewn why the plaintiff had not proceeded in the first instance to establish his right at law, the Court would not, on conflicting affidavits, try the question of nuisance, and, therefore, ought not to grant an injunction. *Semple v. The London and Birmingham Railway Co.*, 120

3. Circumstances under which a plaintiff was held not to have so acquiesced in a damage to his lands complained of as to deprive him of the right to an injunction to restrain such damage. *Innocent v. The North Midland Railway Co.*, 256

4. Acquiescence, by the party complainant, in the erection of works, alleged to be in violation of an act of Parliament, may, before the legal question has been tried, prevent the Court from granting an injunction, which would indirectly have the effect of compelling the removal of the part of the works already built; although, in the same case, the Court, pending the trial at law, restrained the further proceeding with the works. *Her Majesty's Attorney-General, at the relation of Fawcett, v. The Manchester and Leeds Railway Co.*, 436

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ACTION AT LAW.

See CASE AT LAW.

1. A bill was filed to restrain an action at law brought by the defendant against the plaintiffs, on the ground that an agreement on which the action was founded was illegal.

Held, that, where the illegality of an instrument (if it be illegal) appears upon the face of the instrument itself, and is a question cognizable at law, there is no jurisdiction in a Court of Equity to order the instrument to be delivered up and cancelled; and that the circumstance of a question of construction arising upon the instrument (if it be a valid instrument) afforded no ground for equitable interference, where that question could be dealt with as well at law as in equity. *Simpson v. Lord Howden*, 326

2. A Court of Equity, in directing an action at law to be brought, in order to ascertain whether a substituted road has been made by a Railway Company in such a manner as to entitle them, under their act of Parliament, to take an existing road, does not seek so to frame the action as to inform the Company, in the event of the opinion of the Court of Law being against them, what other kind of road they are bound to make. *Kemp v. The London and Brighton Railway Co.*, 508

3. Admissions of fact directed to be made on a trial at law to determine the construction of a clause in a Railway Act. *Bell v. The Hull and Selby Railway Co.*, 616

4. A Court of Equity will not, upon an alleged equity, interfere with an admitted legal right, unless there be a manifest certainty that, at the hearing of the cause, the plaintiff will be entitled to relief; therefore, in a case

where the title to relief, set forth in the bill, was not so manifestly clear, the Court refused to continue the injunction, except upon the terms of the plaintiff giving judgment in the action, and paying the sum sued for into Court. *Playfair v. The Birmingham, Bristol, and Thames Junction Railway Co.*, 640

ADOPTION OF CONTRACT.

See AGREEMENT, 2, 3.

AFFIDAVIT.

1. A Court of Equity will not, on conflicting affidavits, try a question of nuisance, no reason being shewn why the legal right has not been previously established at law. *Semple v. The London and Birmingham Railway Co.*, 120

AGENT.

See AGREEMENT, 4.

ASSENT, 1, 2.

1. A contractor for the execution of railway works must be deemed an agent of the Company. *Semple v. The Birmingham Railway Co.*, 480

AGREEMENT.

See ASSENT, 1.

1. The plaintiff entered into three contracts in writing with a Railway Company, whereby it was agreed (*inter alia*) that the engineer of the Company should, every fortnight, ascertain the value of the work done, according to its quantity and relative proportion to the whole works; and that the plaintiff should thereupon receive £80 per cent. of such value, the remaining £20 per cent. being reserved by the Company, until such reserve amounted to £4000. That, if the engineer of the Company should not be satisfied with the works, the Company should be enabled, after notice given to the contractor, and his default of a satisfac-

tory compliance with its terms for the space of seven days, to take possession of the works, and thereupon not only the plant and materials of the contractors, but also the value of the work done and not paid for, and the reserve fund, should become forfeited to the Company.

A further contract, not in writing, was entered into by the plaintiff and the Company, for executing certain other parts of their works at stipulated prices.

In the course of the work, the Company advanced several sums of money to the plaintiff upon the security of his plant and machinery upon the works comprised in the written contracts, and of the reserve fund.

The Company having given the notice referred to, and having, at the expiration of seven days therefrom, taken possession of the works, plant, and machinery, comprised in all the contracts, the plaintiff filed his bill, praying that the Company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end, and praying, in either alternative, for the taking of the accounts between himself and the Company.

A demurrer to the bill for want of equity was overruled. *Ranger v. The Great Western Railway Co.*, 1

2. An agreement to purchase certain lands of the plaintiff had been entered into by the promoters of an intended Railway Company, and thereupon the plaintiff withdrew his opposition to their proposed bill in Parliament. The promoters of a competing Railway Company, who also proposed to pass through the plaintiff's lands, and to which he was likewise opposed, petitioned Parliament for a bill, and, under the sanction of a committee of a House of Commons, the merits of the respective lines were referred to arbitration.

The two Companies agreed that the successful should adopt the engagements of the rejected Company; and to this agreement the plaintiff by his agent assented.

The award of the arbitrators being in favour of the second Company, their bill passed:—*Held*, that the plaintiff having, on the faith of the agreement between the two Companies, offered no opposition to the passing of the act, the second Company, as the condition of entering upon the lands of the plaintiff, were bound by the terms of the agreement between the plaintiff and the first Company. *Stanley v. The Chester and Birkenhead Railway Co.*, 58

3. Two lines of railway were projected,—the first designed to pass through the centre of the plaintiff's lands; the second through only a small portion at one extremity.

The projectors of the first line agreed to purchase a certain portion of the plaintiff's land at a fixed price, and thereupon he agreed to assent to their proposed act, and he was accordingly returned as an assenting party. The same agreement provided, that, by giving notice to the plaintiff, the projectors might vacate the agreement, if they did not carry out their act. The projectors of the second line declined entering into a similar agreement with the plaintiff, and to their proposed act, they alleged he declared himself, and was returned neutral; but the plaintiff alleged, that he dissented therefrom in writing.

By an arrangement between the two sets of projectors, made at the recommendation of a Committee of the House of Commons, an act was passed for incorporating the projectors of the two lines into one Company for making a railway, which adopted, as far as the lands of the plaintiff were affected, the line designed by the second set of projectors.

The plaintiff alleged, that in the

list of landowners accompanying the consolidated bill, he was returned as assenting; and the Company alleged, that he was returned as neutral.

The projectors of the first line gave a notice to the plaintiff determining the agreement.

The consolidated Company having given a notice to the plaintiff for treating for the portion of his land required for the railway, the plaintiff filed his bill, insisting that some of the projectors of the first line being incorporated in the Company, the Company could not take any portion of this land, except upon the terms of the agreement.

Held, that, inasmuch as the line of railway sanctioned by Parliament materially differed in extent and direction from that contemplated by the projectors of the first line, and the act applied for by them did not in fact pass, and inasmuch also as the projectors of that line had determined the agreement by the notice, the plaintiff was not entitled to enforce the agreement against the consolidated Company. *Greenhalgh v. The Manchester and Birmingham Railway Co.*, 68

4. The directors of a Company, for the incorporation of which a bill was pending in Parliament, had projected a railway to cross a certain turnpike road. The trustees of the road had taken measures for opposing the bill, unless certain clauses, restricting, with regard to such road, the general powers proposed to be granted in the bill, were introduced therein. The Company, by their agent or manager, entered into an agreement with the trustees, to the effect that, instead of such clauses being inserted in the act, the substance of them should be embodied in an agreement between the Company and the trustees. One of the terms of such agreement was, that the trustees should not oppose the bill, and they accordingly made no opposition to it.

The act passed without the restrictive clauses originally contemplated by the trustees :—*Held*, that the incorporated Company could not, as against the trustees exercise a power conferred by the act, in violation of the terms of the agreement. *Edwards v. The Grand Junction Railway Co.*, 173

5. The plaintiff was a lessee of premises, held of the Croydon Canal Company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six months' notice, and two years' reserved rent.

By an agreement between the promoters of a proposed Railway Company, of the first part; the Canal Company, of the second part; the plaintiff and others, as lessees of the Canal Company, of the third part; and the plaintiff and others, as owners of barges on the canal, of the fourth part; it was agreed, that, in consideration of the parties of the second, third, and fourth parts, withholding their opposition to a bill in Parliament, the Railway Company should, in case they purchased from the Canal Company any hereditaments then under lease for any unexpired term of years, purchase the same without prejudice to any such lease, and the price should be ascertained accordingly.

That, in case any of the parties thereto, of the third part, should be applied to by the said Railway Company to treat for any part of the premises then held under leases; or, if any of the said parties should give notice to the Railway Company of their desire to sell the premises held as aforesaid, such parties should accept and be entitled to receive compensation for the nature of their respective leasehold interests, and for damages sustained by them in the execution of the act.

The plaintiff and the other parties withheld their opposition to the bill,

which passed into an act. The Railway Company purchased of the Canal Company the whole of their canal and premises.

The plaintiff gave notice to the Railway Company, requiring them to purchase his leasehold interest, and claiming compensation for damages.

Held, that, by the notice given by the plaintiff, the plaintiff and the Railway Company were immediately placed in the relative situations of vendor and purchaser.

Quære, whether the effect of the agreement, and the notice of the plaintiff, was or not to convert the determinable lease into an absolute term of years. *Doo v. The London and Croydon Railway Co.*, 257

6. The 39th section of the Great Western Railway Act provides for the payment into the Court of Exchequer of the money agreed or awarded to be paid for the purchase of lands, to which a title shall not be made out to the satisfaction of the Company.

The 42nd section provides, that, upon payment, tender, or deposit of such purchase-money, the Company shall be entitled to enter upon such lands.

The Company entered into an agreement with a landholder for the purchase of lands on the line of the railway, and, before acceptance of title or payment, tender or deposit of the purchase-money, entered upon the land.

Held, that such entry was illegal. But *held*, that this was not a case within the act; that, on payment of the purchase-money into the Court in which the bill was filed, the Company were entitled to enter. *Hyde v. The Great Western Railway Co.*, 277

7. An agreement had been entered into between the plaintiff, a Peer of Parliament, and the defendants, projectors of a Railway Company; whereby, in consideration of the plaintiff's withdrawing his opposition to a bill

then before the House of Lords, for authorizing the undertaking, the defendants contracted to pay to the plaintiff £5000, and to endeavour to procure, in the then next Session of Parliament, an act to authorize a deviation from the then contemplated line. It was pleaded, that this agreement was void on three grounds: first, because it had been concealed from the legislature; secondly, because concealed from the other landholders; and, thirdly, because the plaintiff, being a Peer of Parliament, could not legally enter into a contract of that nature.

Held, that the agreement was valid, and that the plaintiff was not bound to communicate to the legislature the bargain he had made with the Company.

Held, also, that the plaintiff was not bound to communicate the agreement to the other landholders; and that a member of the legislature could make any terms for the sale of his land, and compensation for injury to his comforts and property, which it is lawful for a private individual to make. *Lord Howden v. Simpson*, 347

8. A bill was filed by a vendor against a purchaser, averring, that, before completing the contract, the purchaser had entered on the land; and praying a specific performance, and in the meantime an injunction to restrain the defendant from entering on or continuing to hold the premises.

Held, that a tenant of the land contracted to be sold, is not a necessary party. *Robertson v. The Great Western Railway Co.*, 459

9. The Committee of certain subscribers, applying for an act of Parliament, to authorize the formation of a railway, entered into an agreement with the plaintiff, a Peer of Parliament, through whose estates the railway had to pass, that, in consideration of his withholding his opposition to their bill, the incorporated Company, in the event of the railway being, un-

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der the powers of their act, made to pass through the plaintiff's estates, in the line laid down on their Parliamentary plan, should, previous to entering thereon, pay to the plaintiff the sum of £120,000 for the value of the land, and for compensation; and that the Company should, within three weeks after their incorporation, ratify the agreement.

The plaintiff withheld his opposition to the bill, and it passed into an act.

The incorporated Company refused to ratify the agreement; and, being empowered by their act to take compulsorily the plaintiff's land in the line mentioned in the agreement, served on him a notice to treat for the same.

The plaintiff having filed his bill, obtained an injunction, restraining the Company from proceeding to assess the value of such land: and the injunction was afterwards continued, notwithstanding the tender of an undertaking on the part of the Company, not to enter on the land until the further order of the Court; and notwithstanding the time during which the Company were authorized to take lands for the railway, would have expired before the hearing of the cause. *Lord Petre v. The Eastern Counties Railway Co.*, 462

10. By an agreement between the plaintiffs and the agent of a Railway Company, the former agreed to sell to the Company a certain portion of a field for the price of £229 in the whole, being £120 for the land, and £109 for compensation for damage by severance to the remaining portion. The agreement contained a stipulation, that, in case additional land shall be wanted by the Company, the same shall be taken and paid for after the same rate per acre.

The Company subsequently took possession of a second portion of the field for purposes authorized by their act, and entered upon the same with-

out having previously paid the purchase-money for that second portion after the rate specified in the agreement, and without having previously agreed upon or ascertained by reference to a jury the damage occasioned by the severance of the second portion from the remaining portion of the field.

A bill having been filed for an injunction—*Held*, by the Lord Chancellor, that the agreement only provided for the amount to be paid to the plaintiffs for the value of the second portion of the field, and that neither by intention or legal construction did such value include the amount of damage by severance to the remaining portion of the field, which amount was either to be agreed upon by the parties, or ascertained by a jury; that, until such amount was agreed upon or ascertained, the Company were not entitled to enter upon the second portion. *Jones v. The Great Western Railway Co.*, 684

(*Law.*)

11. An agreement had been entered into between the plaintiff, a Peer of Parliament, and the defendants, projectors of a Railway Company, whereby, in consideration of the plaintiff's withdrawing his opposition to a bill then before the House of Lords, for authorizing the undertaking, the defendants contracted to pay to the plaintiff £5000, and to endeavour to procure, in the next Session of Parliament, an act to authorize a deviation from the then contemplated line. It was pleaded, that this agreement was void on three grounds: first, because it had been concealed from the legislature; secondly, because concealed from the other landowners; and, thirdly, because the plaintiff, being a Peer of Parliament, could not legally enter into a contract of that nature.

Held, by the Court of Exchequer Chamber, reversing a judgment of

the Court of Queen's Bench, that the agreement was valid, and that the plaintiff was not bound to communicate to the legislature the bargain he had made with the Company. *Held*, also, by the Court of the Exchequer Chamber, that the plaintiff was not bound to communicate the agreement to the other landholders; *and* that a member of the legislature could make any terms for the sale of his land, and compensation for injury to his comforts and property, which it is lawful for a private individual to make. *Lord Howden v. Simpson*, 347

APPEARANCE.

An injunction may be granted *ex parte*, notwithstanding the defendant has appeared to the bill. *Bell v. The Hull and Selby Railway Co.*, 623

ASCENT AND DESCENT.

See ROADS.

ASSENT TO BILL IN PARLIAMENT (CONDITIONAL).

See AGREEMENT, 2, 3, 4, 5, 7, 9, 10, 11.

1. The trustees of a turnpike road agreed to assent to a bill in Parliament for the formation of a railway, on the condition that the railway should pass over the road at a sufficient elevation, and the road be not lowered or otherwise prejudiced. This qualified assent was returned in both Houses of Parliament;—the bill passed.

The 12th section of the act, among other powers, authorized the Company to raise and sink rivers or streams, roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway, provided that the Company should not divert, obstruct, or impound any river or water to the prejudice of any mill or manufactory.

The 72nd section enacted, that the arch of any bridge for carrying the

railway over or across any turnpike road, should be of a height, from the surface of such road to the centre of such arch, of not less than sixteen feet, provided that the descent under any such bridge should not exceed one foot in thirty feet.

The act contained no particular proviso as to the road in question.

Held, that the modified assent of the road trustees, the terms of which were neither embodied in any agreement between the trustees and the Company, nor adopted by the legislature, afforded no equitable ground for restraining the Company from enforcing, with regard to the road in question, all the powers conferred by the act. *Aldred v. The North Midland Railway Co.*, 404

2. A Company associated for the formation of a railway, were proposing to solicit a bill in Parliament. Some communication passed between their agents and the plaintiff, as to the manner in which the railway was to interfere with a field and plantation belonging to him, situated near his mansion-house. The plaintiff understanding that the railway would not pass through a certain part of his field and plantation, and that his field would not be taken for a terminus station, took no immediate steps for opposing the bill; but subsequently, in the absence of the plaintiff from England, his agent, in answer to a notice served on the plaintiff's land-steward, requiring the whole of the field for the purposes of the railway, returned a written dissent to the bill, and the plaintiff was treated as a dissenting landowner throughout the progress of the bill.

The act having passed, the Company, in exercise of the powers thereby conferred, required of the plaintiff the whole of his field and plantation.

Held, that, inasmuch as the plaintiff, in the communication between him and the Company's agent, did not pre-

clude himself from opposing the bill, and as he was, by the act of his agent, treated as a dissentient landowner, the Company were not bound by any representation made by their agents, for which they had received no consideration. *Hargreaves v. The Lancaster and Preston Railway Co.*, 416

ATTORNEY-GENERAL.

1. *Held*, that individuals, who suffer a special damage from a public nuisance, may sustain a bill to be relieved therefrom without the Attorney-General being a party to the suit. *Spencer v. The London and Birmingham Railway Co.*, 159

AWARD.

See EVIDENCE, 2.

BOND.

By a railway act it was provided, that all parties with whom the Company might have any dispute should, at their own costs, before the Company were obliged to issue their warrant to summon a jury, enter into a bond to prosecute their complaint and pay their proportion of costs, and in case of the warrant being issued without such bond having been entered into, the Company might give notice requiring the same to be done before commencing the inquiry.

Certain premises having been injured by floods occasioned by the Company's works, on an application by the owners for a mandamus to summon a jury to assess damages, it was objected that the damage resulted from acts done partly by the Company, and partly by the applicants themselves, and that the bond required by the act had not been entered into previous to the application. It did not appear that there had been any demand and refusal. *Held*, that there was sufficient doubt on the facts to warrant the issuing of a *mandamus*, and that the entering into the

CHANNEL OF RIVERS.

bond, unless required by the Company, was not a condition precedent to such an application. *The Queen v. The North Union Railway Co.*, 729

BRIDGES.

See CONSTRUCTION OF RAILWAY ACTS, 3, 5, 6, 8, 15.

CALLS.

See PLEADING, 5.

CANALS.

See PASSIM.

CASE AT LAW.

A case having been submitted for the opinion of a Court of Law, and a certificate returned, the Vice-Chancellor refused to send the same case for the opinion of another Court of Law, although the certificate was contrary to the opinion of his Honor. *The Company of Proprietors of the Northam Bridge and Roads v. The London and Southampton Railway Co.*, 653

CERTIORARI.

See CONSTRUCTION OF STATUTES, 17.

CHANNEL OF RIVERS.

A company were authorized by act of Parliament to make, complete, and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and of equal inclination at the sides, with the old course or channel. They were also required to make compensation to persons interested in any houses and lands, injured by means of the execution of the powers thereby granted. The Company, for the purposes of their works, purchased the entirety of certain closes, parts of which, after the undertaking was completed, they sold in lots. One of the conditions of sale was, that a strip of land, lying between the lots and the new channel of the

COMPLETION OF LINE. CONSTRUCTION OF STATUTES. 747

river, should be for ever left open as a public road. This road was afterwards adopted and repaired by the parish, but a portion of it having given way, in consequence of the action of the tide causing a slip in the bank, (whereby the inclination of the sides of the new channel became altered), the owners and occupiers of houses built upon the lots since the sale, called upon the Company to repair the bank, which they refused to do. On an application by the Corporation of Bristol, who are conservators of the river, on affidavits stating these facts, and also stating apprehensions of injury to the navigation, though not shewing any actual impediment caused thereto, the Court granted a *mandamus* to compel the Company to repair and maintain the bank. *The Queen v. The Bristol Dock Co.*, 548

CLERK OF THE PEACE.

See ENROLMENT.

COMPENSATION.

See BOND.

CONSTRUCTION OF STATUTES, 4.
LANDLORD AND TENANT, 1, 2.

COMPLETION OF LINE.

Where a company, who had obtained an act of Parliament for making a railway from L. to N., had only purchased lands and commenced works on a part of the line, (from L. to C.), and it appeared doubtful, from the circumstances stated on affidavit, whether the Company intended to proceed further than C., a *mandamus* was issued, calling upon them to complete the whole line, to set out any proposed deviations from the original line, and to proceed to purchase lands on the remainder of the line, (from C. to N.), pursuant to the provisions of the act. *The Queen v. The Eastern Counties Railway Co.*, 509

CONSTRUCTION OF DEED.

See AGREEMENT.
LEASE.

CONSTRUCTION OF STATUTES.

(*Equity.*)

1. A company were empowered by act of Parliament to take lands for the formation of a railway, and to deviate to the extent of one hundred yards from the line laid down in their map, provided such deviation was made within two years from the passing of the act, and which two years would expire on the 4th of July, 1838.

In January, 1837, a deviation in the line, within the prescribed limits, was made.

A subsequent act, passed in May, 1837, enacted that the time by the first act limited for the compulsory purchase of lands should be enlarged for the term of one year, but providing that no deviation from the line laid down should be made after the expiration of the period by the first act limited.

The Railway Company, subsequently to the 4th of July, 1838, gave notice to certain owners of lands on the line to which they had deviated in January, 1837, of their intention to take the lands under the powers given by the acts. On a motion for an injunction to restrain the Railway Company from so proceeding to obtain possession, on the ground that the Company, having allowed the time limited by the first act to expire, had no power to take the lands by the compulsory process:—*Held*, that the Company having, previous to the expiration of the two years limited by the first act, and previous, also, to the passing of the second act, deviated within the authorized limits from the line laid down in the map, the second act must be construed to give them an enlarged period of one year

in which to exercise the power of taking the land in the line to which they had so deviated. *The River Dun Navigation Co. v. The North Midland Railway Co.*, 135

2. The following clauses are contained in the Great Western Railway Company's Act.

Section 99, enacting, that it shall not be lawful for the Company to alter or divert any part of the line of railway as then laid down, nor to make any other railway, tram-road, or other road or way to the south of the line, within three miles of Eton.

Section 100, enacting, that it shall not be lawful for any company or person to form, make, or lay down any branch railway or tram-road, or other road or way whatever, passing or approaching within the same limits.

Section 101, enacting, that no dépôt, station, yard, wharf, waiting, watering, loading, or unloading place, shall be made within the same distance.

Sections 102 and 103, enacting, that the Company shall erect and maintain a fence on each side of the railway, within certain parishes, for a distance of four miles; and shall maintain a police for preventing all access to the railway by the scholars of Eton.

The Company diverted an existing road within the prescribed distance, and fenced off and appropriated part of the site of such former road as a passage communicating with the railway, by which passengers were invited to pass on foot to and from, and to be taken up and set down by the trains stopping at the end of such passage. They also hired two rooms in a public-house erected at the entrance of such passage; and the same were used as a booking-office and waiting-place, in the same manner as the station-houses of the Company were used.

Held, that the act did not prohibit the Company from taking up and setting down passengers at that place.

Held, that the passage in question was not a road within the meaning of section 100.

Held, also, that the house in question was not a station or waiting place within the meaning of section 101. *The Provost and Eton College v. The Great Western Railway Co.*, 200

3. A company were empowered by an act of Parliament to do all works necessary and convenient for constructing a railway, and among others to cross canals and make embankments in the line; and in particular to cross a canal of which the defendants were the proprietors, and to make an embankment over a valley near the same place.

Subsequent clauses in the act restricted the Company from doing anything which should obstruct the navigation of the canal, or any part thereof, and specified the height and dimensions of any bridge to be made and maintained for carrying the railway over the canal.

The Company, for the purpose of transporting earth from the higher lands on the south to the lower land on the north side of the canal for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal.

Held, that the clause empowering the Railway Company to cross canals in the progress of their works was not restricted by the subsequent clauses which applied to permanent bridges. *The London and Birmingham Railway Co. v. The Grand Junction Canal Co.*, 224

4. The 12th section of the North Midland Railway Act empowered the Company to take lands for the purposes of the act, and to enter upon lands adjoining to the railway, and to dig and use materials obtained therein; they, the Company, making full satisfaction for all lands to be so taken, used, or injured, and for all damages,

by reason of the execution of all or any of the powers thereby granted.

The 31st section enabled proprietors, occupiers, or persons interested in such lands, to receive payment for the value thereof, and also compensation for any damage by the severance of such lands; and for any damage, loss, or inconvenience sustained by the taking thereof.

The 32nd section, for settling all differences to arise between the Company and the proprietors of, or persons interested in lands which should be taken, damaged, or injuriously affected, provided for the impannelling of juries to assess the amount of the purchase-moneys and compensation.

The 53rd section enabled the Company, upon payment, tender, or deposit of the sums of money agreed upon or awarded for the purchase of any lands, immediately to enter upon such lands; provided, that before such payment, &c., it should not be lawful for the Company to enter upon such lands for any of the purposes of the act.

The 54th section provided, that, before taking temporary possession of any lands, the Company should agree with the owners or occupiers for an annual rent in respect thereof; and, if required, should give security for payment of compensation for any permanent injury which might be sustained.

The Company having entered upon lands of the plaintiff, for the purpose of taking the subsoil to form an embankment, he filed his bill, praying that they might be restrained from so doing, until they should have agreed with him for a fixed annual rent during their occupation of the land, and given security for compensation.

Held, that the acts complained of were not within the 54th section, but were, by the proviso of the 53rd section, brought within the conditions of the 12th section. *Innocent v. The North Midland Railway Co.*, 242

5. The London and Southampton Railway Acts direct, that where any bridge shall be erected for the purpose of carrying any turnpike road over or across the railway, the ascent to such bridge shall not be more than one foot in thirty feet, except where the "present inclination" of such turnpike road shall be steeper, in which case the inclination of such road shall not be steeper than the present inclination of such road.

Held, that the expression "present inclination," is to be referred to the inclination of a road at the time when taken by the Company.

That the exception applies as well to a bridge built on a new or diverted road made by the Company, as to a bridge built on the site of a previously existing turnpike road.

That the relative steepness of a new or diverted road and of an old road is to be determined, not by their comparative declivity, measuring the whole length of each from the commencement to the end of the deviation, but by a comparison of the rate of ascent on the new road, from the place of diversion below the bridge to the crown of the arch of such bridge, with the rate of ascent on the old road, from the same place to the point on the old road at which, if the two roads had been parallel, the same distance would be attained. *The Attorney-General, at the relation of Mitford, v. The London and Southampton Railway Co.*, 283

6. The 9th section of the London and Southampton Railway Act, empowered the Company to make in, upon, across, under, or over any lands, streets, hills, valleys, and roads, such inclined planes, tunnels, embankments, bridges, arches, and piers, as the Company should think proper, according to the provisions and subject to the restrictions of the act.

The 74th section provided, that where any bridge should be erected by the Company, for the purpose of car-

rying the railway over or across any turnpike road, or other public highway, the span of the arch thereof should be of such width as to leave a clear and open space under every such arch of not less than fifteen feet.

The 77th section provided, that where, in the exercise of the powers of the act, any part of any carriage or horse road, either public or private, should be found necessary to be cut through, diverted, raised, sunk, taken, or so much injured as to be impassable, the Company should, previously thereto, cause a sufficient road to be made instead thereof, as convenient for passengers and carriages as the road to be cut through, or as near thereto as might be.

The Company erected a bridge over a turnpike road, at a place where the width of the then existing road was forty feet; and owing to such bridge crossing the road obliquely, and to the piers of the bridge being built upon the road, the passage under the arch of the bridge left a width of road of twenty-four feet only, for a distance of one hundred and sixty feet.

Held, that the restrictions imposed by the 77th section, applied only to a case where a road might be either temporarily or permanently diverted; that under the 9th section, the Company were empowered to erect any piers or necessary buildings for a bridge, provided they left a width under such bridge of fifteen feet, as provided for by the 74th section. *The Attorney-General, at the relation of Walton, v. The London and Southampton Railway Co.*, 302

7. The 9th section of the Commercial Railway Act, empowered the Company to enter upon and take, for the purposes of their undertaking, property therein described, not being houses, buildings, yards, or gardens.

The 14th section provided, that, at the expiration of fourteen days after notice given by the Company of their

intention to take lands, the owner thereof should deliver to the Company a statement of the particulars of his claim in respect thereof.

The 22nd section provided for the impannelling of juries to assess the value of the land after such notice, in case of no agreement being come to between the owner and the Company.

The 45th section enacted, that the Company should not be authorized to take any house or other building, or any ground set apart and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk or avenue planted as an ornament or shelter to a house, or any inclosed ground planted as an ornament or a shelter to a house, or planted and set apart as a nursery for trees, other than such as are specified in the schedule.

The 50th section enacted, that in cases of application by the Company for any part of any house, garden, yard, warehouse, building, or manufactory in the actual occupation of one person or several persons jointly, and twenty-one days' notice to that effect given to the Company, they should not be empowered to take or use less than the whole of such house, garden, yard, &c.

In the schedule to the act a bonded timber-yard of three acres in extent, containing certain detached sheds and buildings thereon, was inserted under the description of "Timber Yard."

Held, that the Company had no power, under the 22nd section, to summon a jury to assess the value of lands, as to which they had given no previous requisition to treat under the 14th section.

Held, that the notice to treat under the 14th section constituted the relative situation of vendor and purchaser as between the Company and the landowner, and that the Company had no power, under the 22nd section, to summon a jury to assess the value of

a less quantity of land than that for which they had previously given notice to treat.

Held, that the premises in question did not constitute a yard within the meaning of the 50th section. *Stone v. The Commercial Railway Co.*, 375

8. The 12th section of the North Midland Railway Act, among other powers, authorized the Company to raise and sink rivers or streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway, provided that the Company should not divert, obstruct, or impound any river or water to the prejudice of any mill or manufactory.

The 72nd section enacted, that the arch of any bridge for carrying the railway over or across any turnpike road, should be of a height from the surface of such road to the centre of such arch of not less than sixteen feet, provided that the descent under any such bridge should not exceed one foot in thirty feet.

The act contained no particular proviso as to the road in question.

Held, that the Company were authorized to sink the original surface of a turnpike road, in order to give the specified elevation to the arch of a bridge erected for carrying the railway over the road in question, notwithstanding that the effect, from the peculiar situation of the road, would be to render it liable to be occasionally flooded. *Aldred v. The North Midland Railway Co.*, 404

9. An act of Parliament for the formation of a railway, containing a declaration that it is to be judicially taken notice of as a public act, cannot be treated or construed as a private assurance. *Hargreaves v. The Lancaster and Preston Railway Co.*, 416

10. A notice, under the usual power contained in Railway Acts, to treat for part of a rope-walk in the line of the railway, was accompanied by a diagram or plan of the entire rope-

walk, indicating by coloured lines the manner in which the railway would intersect it, and the portion required to be treated for, but having no scale of admeasurement appended to the diagram or plan.

Held, by the Vice-Chancellor, that the notice was sufficient. *Sims v. The Commercial Railway Co.*, 431

11. The 94th section of the Manchester and Leeds Railway Act empowers the Company to enter into and upon the lands of any person or corporation whatsoever, according to the provisions and restrictions of the act, and in or upon such lands, or in or upon any lands adjoining thereto, to bore, dig, cut, embank, and remove, and use any earth, stone, gravel, or sand, or any materials or things which may be dug or obtained therein, or otherwise in the execution of the powers of the act, and which may be proper or necessary for making, maintaining, repairing, or using the railway, and other works by the act authorized, or which may obstruct the making, maintaining, or using the same; and it empowers the Company, according to the provisions and restrictions of the act to make or construct inclined or other planes, tunnels, embankments, bridges, &c.

The 96th section enacts, that the lands to be taken for the line of the railway shall not exceed twenty-two yards in breadth, except where a greater width may be required for either embankments or cuttings.

Semble, the Company have not, under these clauses, power by compulsory process to purchase or take land for the purpose of making an embankment upon other and lower land adjoining. *Webb v. The Manchester and Leeds Railway Co.*, 576

12. Ambiguous words in an act of Parliament, authorizing a public company to take land by compulsory process, are to be construed against the company in favour of private property.

Webb v. The Manchester and Leeds Railway Co., 576

13. Admissions of fact directed to be made on a trial at law to determine the construction of a clause in a railway act. *Bell v. The Hull and Selby Railway Co.,* 616

14. The 70th and 71st sections of the Southampton Railway Act provide for the crossing by the railway of roads, not being turnpike roads.

The 72nd section provides that a turnpike road which shall be crossed by the railway shall be raised or sunk, so as to pass over or under the railway.

The railway being proposed to cross the Northam Bridge Road in the mode provided for by the 70th and 71st sections, the plaintiffs, the proprietors of the road, filed their bill, insisting that the road was a turnpike road, and praying to restrain the Railway Company from crossing over, or using the same, until they should have complied with the 72nd section.

On a motion for an injunction, the Vice-Chancellor, being of opinion that the road was not a turnpike road, and therefore not within the 72nd section, refused the motion, but gave leave to the plaintiffs to take the opinion of a court of law upon the question, as being one of legal construction. A case was accordingly made for the opinion of the Court of Exchequer, and a certificate returned by the Judges of that Court, stating, that the Northam Bridge Road was a turnpike road. *The Company of Proprietors of the Northam Bridge and Roads v. The London and Southampton Railway Co.,* 653

(*Law.*)

15. By the London and Birmingham Railway Act, the Company are empowered to make roads over the railway, and for that purpose to alter the course of, or raise any road or way. Section 63 provides, that when any

turnpike or public carriage road shall be carried over the railway, the road shall be of the clear width of fifteen feet within the fences of the bridge. And by section 67, where any part of any carriage or horse road shall be cut through, raised, sunk, or taken, the Company shall cause another good and sufficient road to be made instead thereof, as convenient for passengers and carriages as the former. The Company diverted a highway, and erected a bridge to carry it over the railway. The original road was forty feet wide, and the substituted one only twenty-seven, less convenient for driving sheep and cattle. The span of the bridge was thirty-three feet, but it was continued with wing-walls and parapets to the distance of 168 feet, and the width of the road on the bridge and between the parapets was only sixteen feet.

Held, that the new road being narrower, was not as convenient as the old one, nor a good and sufficient road within the meaning of the 67th section, the act intending it to be as convenient for a drift-way as for passengers and carriages:—*Held*, also, that fifteen feet is the maximum width required by the act for such bridges; but that the Company had no right to contract the road by the wing-walls and parapets, beyond the span of the bridge. *The Queen v. The London and Birmingham Railway Co.,* 317

16. By a railway act it was provided, that the Company should not carry the railway across a certain turnpike road, except by means of a bridge of the width of thirty feet, so as to form a clear carriage road under the bridge of the width of twenty-four feet, with a footpath of six feet, and of the height of eighteen feet from the under side to the surface of the road; and that in case it should be necessary to lower the bed or surface of the road, it was to be so effected that the ascent on the road should not exceed one foot in fifty on the south side of the bridge, and one

foot in a hundred on the north. That the Company should make new fences and drains, and relay and reform the road; and that the alterations should be made under the superintendence and directions of the trustees of the road. The Company made a bridge over the road, and lowered the surface under the bridge to the depth of nine feet, giving the required ascent on each side; but instead of making the bed of the new road forty-two feet wide, (the width of the old road), they made a sunken carriage-way of thirty-five and a half feet in width on the north, and of twenty-four feet under and on the south side of the bridge; leaving the footpath at the original level, and having reduced its width in some places from six to three and a half feet, by making steps descending to the carriage-way.

Held, that such works of the Company were not a compliance with the act: and a rule for issuing a mandamus was made absolute. *The Queen v. The Manchester and Leeds Railway Co.*, 523

17. A Railway Company issued their warrant to the sheriff of a county, requiring him to summon a jury to assess damages under the compensation clause of their act; the sheriff summoned a jury accordingly. At the inquisition neither sheriff nor under-sheriff presided, but a clerk of the latter, assisted by a barrister as assessor. Both the assessor and the clerk had been appointed by the sheriff his deputies for this purpose. The sheriff returned the verdict and judgment (purporting to have been taken and delivered by himself) to the clerk of the peace, (by section 67) to be deposited among the records of the Quarter Sessions. By section 220 of the act, it was provided that no proceeding had or taken in pursuance of the act should be removed by certiorari.

Held, that these proceedings having been correctly originated by warrant to

the sheriff, were in pursuance of the act, and therefore not removable by certiorari. *The Queen v. The Sheffield, Ashton-under-Lyne, and Manchester Railway Co.*, 537

CONTRACT.

See AGREEMENT.

CONTRACTOR.

1. A contractor for the execution of railway works must be deemed an agent of the Company. *Semple v. The London and Birmingham Railway Co.*, 480

CONVEYANCE.

See ENROLMENT.

COSTS.

See BOND.

COURT OF EQUITY.

1. The jurisdiction of the Court of Chancery to restrain by injunction a nuisance, exists for the purpose of protecting a legal right, and is not an original jurisdiction; and where no reason is shewn why a plaintiff has not in the first instance proceeded to establish his right at law, the Court will not on conflicting affidavits try the question of nuisance. *Semple v. The London and Birmingham Railway Co.*, 120

2. *Held*, that where it is clearly shewn that a public company is exceeding its powers, a Court of Equity cannot refuse to interfere by injunction. *The River Dun Navigation Co. v. The North Midland Railway Co.*, 135

3. *Held*, that where the illegality of an instrument (if it be illegal) appears upon the face of the instrument itself, and is a question cognizable at law, there is no jurisdiction in a Court of Equity to order the instrument to be delivered up and cancelled; and that the circumstance of a question of construction arising upon the instru-

754 DAMAGE SPECIAL.

ment (supposing it to be valid) affords no ground for equitable interference, where the question can be dealt with as well at law as in equity. *Simpson v. Lord Howden*, 326

4. *Held*, that a Court of Equity has no jurisdiction to restrain persons from soliciting a bill in Parliament, which, having been entertained by the House of Commons, had become the proceeding of the Legislature, although the conduct of the persons in first soliciting the bill was in violation of an undertaking entered into by them with the Court. *The Attorney-General v. The Manchester and Leeds Railway Co.*, 436

5. Application of the principles of Courts of Equity, in restraining the exercise of powers granted by Parliament for the compulsory taking of land and diverting of roads, in cases where there is a question for the decision of a Court of Law, whether conditions imposed as precedent to the exercise of such powers have been duly performed. *Kemp v. The London and Brighton Railway Co.*, 495

6. A Court of Equity, in exercising its jurisdiction to prevent Companies, intrusted with large powers by the Legislature, acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers, for the purpose of giving effect to exorbitant claims against the Companies. *Bell v. The Hull and Selby Railway Co.*, 616

7. A Court of Equity ought not, upon an alleged equity, to interfere with an admitted legal right, unless there be a manifest certainty that at the hearing of the cause the plaintiff will be entitled to relief. *Playfair v. The Birmingham, Bristol, and Thames Junction Railway Co.*, 640

DAMAGE SPECIAL.

See NUISANCE, 2.

EVIDENCE.

DEMURRER.

See PLEADING.

DESCRIPTION OF LANDS.

See NOTICE, 4.

DEVIATION

From Line of Railway as laid down in Maps deposited with Clerk of Peace.

See CONSTRUCTION, 1.

DISSENT TO ACT OF PARLIAMENT.

See ASSENT.

EASEMENT.

Although a Court of Equity, on the application of one of several persons entitled to an easement, restrained an excessive use thereof by a Railway Company, it refused, under the circumstances, to restrain the total use thereof. *Semple v. The London and Birmingham Railway Co.*, 480

ENGINEER.

See EVIDENCE, 2.

ENROLMENT.

By a Canal Act, (10 Geo. 3, c. cxiv), the Company were required to enrol with the clerk of the peace all conveyances, &c., relating to the purchase of lands taken by them for the purposes of their act. On an application for a *mandamus* to compel them to enrol a conveyance executed more than sixty years since:—*Held*, that they could not be called upon, after so many years, to do so. *The Queen v. The Leeds and Liverpool Canal Co.*, 723

EVIDENCE.

See AFFIDAVIT.

1. Inference deduced by a Court of Equity from the language of a precept issued under the power of a railway act for summoning a jury to assess the

value of land, and from the *indicia* of a coloured plan annexed thereto as to what parts of the land therein referred to and described have been taken into consideration by the jury in their verdict proceeding upon such precept. *Kemp v. The London and Brighton Railway Co.*, 495

2. A point involving questions of practical science being in dispute, and the affidavits being conflicting, the evidence was, at the suggestion of the Court, and with the consent of both parties, referred to an engineer for his report on the question in dispute, and the conclusion of the engineer upon the facts was adopted by and made the ground of the order of the Court. *Webb v. The Manchester and Leeds Railway Co.*, 576

FOOTPATH.

See CONSTRUCTION, 16.
INJUNCTION.

1. Whatever may be the equity of a plaintiff with regard to the enforcement of a contract, if, after he is well aware of the alleged right, he, by his conduct, has led a party to believe that he had no intention to enforce the performance of the agreement, the Court will not interfere on his behalf by injunction. *Greenhalgh v. The Manchester and Birmingham Railway Co.*, 68

2. An injunction of the Court of Chancery to restrain a nuisance exists for the purpose of protecting a legal right, and is not an original jurisdiction; and, therefore, in a case of alleged nuisance, where no reason was shewn why the plaintiff had not in the first instance proceeded to establish his right at law, an injunction was refused. *Semple v. The London and Birmingham Railway Co.*, 120

3. Where a public company is exceeding its powers, a Court of Equity cannot refuse to interfere by injunction, notwithstanding that irreparable mis-

chief is not shewn to result from the proceedings of the Company. *The River Dun Navigation Co. v. The North Midland Railway Co.*, 135

4. Parties injured by the conduct of a Railway Company, in exceeding the powers conferred upon them by act of Parliament, are entitled to the most effectual remedy within the power of a Court of Equity, and where it appeared that the injury complained of would be remedied by suspending an injunction, an injunction which had been granted was suspended for three weeks. *Spencer v. The London and Birmingham Railway Co.*, 159

5. Acquiescence by the party complainant in the erection of works alleged to be in violation of an act of Parliament, may, before the legal question has been tried, prevent the Court from granting an injunction, which would indirectly have the effect of compelling the removal of the part of the works already built, although in the same case the Court may, pending the trial, restrain the further proceeding with the works. *Her Majesty's Attorney-General, at the relation of Fawcett, v. The Manchester and Leeds Railway Co.*, 436

6. An injunction, granted to restrain a Railway Company from proceeding to assess the value of the plaintiff's land, was continued, notwithstanding the tender of an undertaking on the part of the Company not to enter on the land until the further order of the Court; and notwithstanding the time, during which the Company were authorized to take lands for the railway, would expire before the hearing of the cause. *Lord Petre v. The Eastern Counties Railway Co.*, 462

7. A contractor for railway works deposited, during the 1st and 2nd of March, a quantity of clay on a road near to the entrance to the plaintiff's wharf. On the 10th of March the plaintiff filed his bill to restrain the company from laying down, or causing to

be laid down, any clay on the road; and upon an affidavit made the same day, verifying the facts, he obtained, on the 12th of March, an *ex-parte* injunction prohibiting such further deposit. The Company had begun to remove the clay on the 9th of March, of which fact the plaintiff was ignorant at the time of making his affidavit:—*Held*, that although the plaintiff might, if he had made inquiries, have known that the clay was in course of removal, yet his ignorance of that fact, owing to which it was not made known to the Court, was not equivalent to concealment or misrepresentation, and that the *ex-parte* injunction was therefore not improperly obtained. *Semple v. The London and Birmingham Railway Co.*, 480

8. A Railway Company, under the powers of their act, purchased a subsisting lease in lands, and they gave a notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee-simple and inheritance thereof. The plaintiff filed his bill, insisting that the Company were not authorized by their act to take more than a certain portion of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion.

Held, by the Vice-Chancellor, that inasmuch as the contemplated proceedings would, if the Company were not authorized by their act to take the land in question, be a nullity, and, inasmuch as the entry and possession of the plaintiffs as derivative lessees was lawful, and no case being made of any sudden grievous injury done to the inheritance, the motion for the injunction must be refused with costs. *Mouchet v. The Great Western Railway Co.*, 567

9. A Railway Company will not be prevented by injunction from taking lands for purposes warranted by their act, on the ground that previously to

the filing of the bill, and before the necessity of taking it for such purposes was made known to the owners, the Company had endeavoured to take the lands for other purposes not so warranted. *Webb v. The Manchester and Leeds Railway Co.*, 576

10. A question existing for the opinion of a Court of Law, upon the construction of a reservation in a lease, the property comprised in the lease will be protected pending the necessary trial at law, and it will be made a condition of granting such injunction, that the plaintiff proceed to a trial of the question at the earliest possible opportunity. *Farrow v. Vansittart*, 602

11. The 69th section of the Hull and Selby Railway Act enacts that, in all cases in which, in the exercise of any of the powers thereby granted, any part of any quay, wharf, or other communication, either public or private, be found necessary to be cut through, taken, or so much injured as to be impassable or inconvenient for the transporting, conveying, landing, shipping, or depositing of any goods or merchandise, the Company shall, at their own expense, before any such quay, wharf, or other communication shall be cut through, taken, or injured as aforesaid, cause another good and sufficient quay, wharf, or other communication to be set out and made instead thereof, as convenient for transporting, conveying, landing, shipping, or depositing of goods and merchandise as the quay, wharf, or other communication so to be cut through, taken, or injured as aforesaid, or as near thereto as might be.

The railway was made to pass in front of a wharf belonging to the plaintiff, separating the frontage thereof from the water, but the Company had made a jetty or communication leading from the water to the wharf. The plaintiff had obtained an injunction *ex parte*, restraining the Company from

prosecuting any works which would render the plaintiff's wharf inconvenient for its purposes, until they had made another good and sufficient wharf as convenient as the old wharf, or as near thereto as might be.

Held, on motion to dissolve the injunction, that the injunction should be continued until after the trial of an action at law, on the question whether the plaintiff was entitled to have a wharf, such as he claimed, made for him; in which action it was to be admitted, that the Company had made a jetty as represented on a model produced by them. That the Court would not, in the meantime, permit the defendants to proceed with their works, unless it was clear that the Court would have jurisdiction to deal with such works as it should think proper after a trial at law. That the plaintiff, in such a case, is entitled to an injunction restraining the prosecution of works, notwithstanding these works are so far advanced that such prosecution thereof would not be further prejudicial to the plaintiff, and the only effect would be to restrain the Company from completing the railway. *Bell v. The Hull and Selby Railway Co.*, 616

12. Although an injunction *ex parte* upon a statement in which material facts are concealed or misrepresented, would, on a speedy application, be dissolved with costs, yet that is not a sufficient ground for a motion to dissolve that injunction, after a period of several months has elapsed, before notice of such motion is given; nor will the question, whether there has been such concealment or misrepresentation be taken into consideration on appeal from an order made by the Court in which the injunction was granted, and by which order the injunction was continued and the costs reserved. *Bell v. The Hull and Selby Railway Co.*, 616

13. An injunction may be granted

ex parte, notwithstanding the defendant has appeared to the bill. *Bell v. The Hull and Selby Railway Co.* 623

14. A railway act empowered the Company to make calls upon the shares, and in case of nonpayment to sue the proprietors or to declare the shares to be forfeited, prescribing certain formalities to be observed in the declaration of such forfeiture. The act also allowed an owner of shares not in arrear for calls to sell and transfer his shares, with certain formalities; and it authorized the Company to buy up shares offered for sale.

The plaintiff, a registered proprietor of one hundred shares, and a director of the Company, offered to the other directors to forfeit and relinquish his shares; the directors accepted the offer, and a deed was prepared for the purpose by the solicitors of the Company, and was executed by the plaintiff. None of the formalities required by the act for the forfeiture or sale and transfer of shares were complied with. In August, 1837, the plaintiff ceased to be a director of the Company. In the same month a call was made on the shareholders of the Company, and in May, 1838, a subsequent call was made. In August, 1838, the Company called upon the plaintiff to pay the whole of the calls on his shares, and on his default to do so, they, in December, 1838, commenced an action at law against him for the amount of such calls.

The plaintiff filed his bill and obtained the common injunction, which was extended to stay trial of the action. The Company obtained the order nisi to dissolve, on putting in their answer. Upon cause being shewn, the Vice-Chancellor continued the injunction.

Held, by the Lord Chancellor, that the Court cannot, upon an alleged equity, interfere with an admitted legal right, unless there be a manifest certainty that at the hearing of the cause

the plaintiff will be entitled to relief; that the title to relief in this case was not so clear as to justify the Court in continuing the injunction, except upon the terms of the plaintiff giving judgment in the action, and paying the amount sued for into Court. *Playfair v. The Birmingham, Bristol, and Thames Junction Railway Co.*, 640

15. The 70th and 71st sections of the Southampton Railway Act provide for the crossing by the railway of roads, not being turnpike roads.

The 72nd section provides, that a turnpike road which shall be crossed by the railway, shall be raised or sunk so as to pass over or under the railway.

The railway being proposed to cross the Northam Bridge Road in the mode provided for by the 70th and 71st sections, the plaintiffs, the proprietors of the road, filed their bill, insisting that the road was a turnpike road, and praying to restrain the Railway Company from crossing over or using the same, until they should have complied with the 72nd section.

On a motion for an injunction, the Vice-Chancellor, being of opinion that the road was not a turnpike road, and therefore not within the 72nd section, refused the motion, but gave leave to the plaintiffs to take the opinion of a Court of Law upon the question, as being one of legal construction. A case was accordingly made for the opinion of the Court of Exchequer, and a certificate returned by the Judges of that Court, stating that the Northam Bridge Road was a turnpike road.

The Vice-Chancellor, on an application by the Railway Company, refused to send the legal question for the opinion of another Court of Law.

Upon a motion for the injunction as consequent upon the above certificate:—*Held*, that as the object of the plaintiffs must be to procure for the public using the road a compliance with the

72nd section of the Railway Act: upon the Railway Company entering into an undertaking to proceed with and complete a bridge over the road with all possible despatch, an injunction ought not to be granted during the time which must necessarily elapse in building the bridge. *The Proprietors of the Northam Bridge and Roads v. The Southampton Railway Co.*, 653

16. Upon an undertaking by a Railway Company to pay amount of damage done to land by severance, and to take proper proceedings, if necessary, for ascertaining such amount, an injunction restraining them from entering upon adjoining land until the amount of such damage was ascertained, was withheld. *Jones v. The Great Western Railway Co.*, 684

JURISDICTION.

See COURT OF EQUITY.
INJUNCTION.

JURY.
See EVIDENCE.

LACHES.
See INJUNCTION.

LAND,
Power to take, and description of.
See INJUNCTION, 3.
NOTICE, 4.

LANDLORD AND TENANT.

See LEASE.

1. The defendant was tenant from year to year of premises which he occupied at a rent payable half-yearly, viz. on April 1st and October 1st. On the 28th of January, 1838, he received from a Railway Company, under the powers of their act, notice to quit at the end of six months, and on the 28th of July he gave up possession to them without applying for or receiving com-

pensation for his interest in the premises, to which he was entitled by the act. *Held*, that he was liable to his landlord for the rent up to October, 1838. *Wainwright v. Ramsden*, 714

By a Railway Act it was provided, that tenants from year to year, and other persons in possession of lands required for the purposes of the act, should deliver up possession of such lands to the Company six months after notice to that effect, without reference to the time of the commencement of their term, and that if they should be required to deliver up possession before the expiration of their term or interest therein, they should be entitled to compensation. The Company in January gave notice as above to a yearly tenant; they afterwards purchased the landlord's interest, and finding that the tenancy commenced at Christmas, they gave notice to the tenant that the premises would not be required till the Christmas following, and he continued in possession accordingly until and after that period. *Held*, that the tenant had no interest for which the Company were bound to make him compensation, the premises not having been given up in pursuance of the notice under the act. *The Queen v. The London and Southampton Railway Co.*, 717

LANDOWNER CONTERMINOUS.

See WORKS, RAILWAY, 2.

LEASE.

See LANDLORD AND TENANT.

The plaintiff was a lessee of premises, held of the Croydon Canal Company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six months' notice, and two years

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reserved rent. By an agreement between the promoters of a proposed Railway Company, of the first part; the Canal Company, of the second part; the plaintiff and others, as lessees of the Canal Company, of the third part; and the plaintiff and others, as owners of barges on the Canal, of the fourth part; it was agreed, that, in consideration of the parties of the second, third, and fourth parts, withholding their opposition to a bill in Parliament, the Railway Company should, in case they purchased from the Canal Company any hereditaments then under lease for any unexpired term of years, purchase the same without prejudice to any such lease, and the price should be ascertained accordingly. That in case any of the parties thereto of the third part should be applied to by the Railway Company to treat for any part of the premises then held under leases; or if any of the said parties should give notice to the Railway Company of their desire to sell the premises held as aforesaid, such parties should accept, and be entitled to receive compensation for the nature of their respective leasehold interests, and for damages sustained by them in the execution of the act. The plaintiff and the other parties withheld their opposition to the bill, which passed into an act. The Railway Company purchased of the Canal Company the whole of their canal and premises. The plaintiff gave notice to the Railway Company, requiring them to purchase his leasehold interest, and claiming compensation for damages. The Railway Company, tendering to the plaintiff two years reserved rent, gave a counter notice to determine the tenancy at the end of six months; at the expiration of which they brought an ejectment. The plaintiff obtained an injunction. *Held*, that, by the notice given by the plaintiff, the plaintiff and the Railway Company were imme-

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the plaintiff will be entitled to relief; that the title to relief in this case was not so clear as to justify the Court in continuing the injunction, except upon the terms of the plaintiff giving judgment in the action, and paying the amount sued for into Court. *Playfair v. The Birmingham, Bristol, and Thames Junction Railway Co.*, 640

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See LANDLORD AND TENANT.

The plaintiff was a lessee of premises, held of the Croydon Canal Company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six months' notice, and two years

reserved rent. By an agreement between the promoters of a proposed Railway Company, of the first part; the Canal Company, of the second part; the plaintiff and others, as lessees of the Canal Company, of the third part; and the plaintiff and others, as owners of barges on the Canal, of the fourth part; it was agreed, that, in consideration of the parties of the second, third, and fourth parts, withholding their opposition to a bill in Parliament, the Railway Company should, in case they purchased from the Canal Company any hereditaments then under lease for any unexpired term of years, purchase the same without prejudice to any such lease, and the price should be ascertained accordingly. That in case any of the parties thereto of the third part should be applied to by the Railway Company to treat for any part of the premises then held under leases; or if any of the said parties should give notice to the Railway Company of their desire to sell the premises held as aforesaid, such parties should accept, and be entitled to receive compensation for the nature of their respective leasehold interests, and for damages sustained by them in the execution of the act. The plaintiff and the other parties withheld their opposition to the bill, which passed into an act. The Railway Company purchased of the Canal Company the whole of their canal and premises. The plaintiff gave notice to the Railway Company, requiring them to purchase his leasehold interest, and claiming compensation for damages. The Railway Company, tendering to the plaintiff two years reserved rent, gave a counter notice to determine the tenancy at the end of six months; at the expiration of which they brought an ejectment. The plaintiff obtained an injunction. *Held*, that, by the notice given by the plaintiff, the plaintiff and the Railway Company were imme-

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diately placed in the relative situations of vendor and purchaser; and that the Company could not eject the plaintiff until they had paid the purchase-money in respect of such interest in the premises as then belonged to the plaintiff.

Quære—Whether the effect of the agreement, and the notice of the plaintiff, was or was not to convert the determinable lease into an absolute term of years? *Doo v. The London and Croydon Railway Co.*, 257

2. A Railway Company, under the powers of their act, purchased a subsisting lease in lands, and they gave a notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee-simple and inheritance thereof. The plaintiff filed his bill, insisting that the Company were not authorized by their act to take more than a certain portion of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion:—*Held*, that, inasmuch as the contemplated proceedings would, if the Company were not authorized by their act to take the land in question, be a nullity; and, inasmuch as the entry and possession of the plaintiffs as derivative lessees were lawful; and no case being made of any sudden grievous injury done to the inheritance, the motion for the injunction must be refused with costs. *Mouchet v. The Great Western Railway Co.*, 567

3. The plaintiff was a lessee for a term of twenty-one years of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, seams of clay, with full and free authority and power to enter and cut down, and to dig, win, work, get and carry away the same, with free ingress, egress, way-leave, and passage to and from the same, or to or from any other mines, quarries, and seams of clay, on foot and on

horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways in and over the demised premises, paying reasonable damages.

The Vice-Chancellor inclining to the opinion, that the reservation did not enable the lessors to grant to a public company a license to make a railway for the purpose of conveying passengers and general merchandize, but was only intended to enable the lessors or their grantees to convey mineral produce and wood from the demised lands to and from adjacent lands, granted an injunction restraining the lessors and their licensees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a court of law.

Upon affidavits filed by the licensees, stating that the proposed railway was intended to be used for purposes and objects which should be held to be within the terms of the reservation; that the primary purpose of the railway was to convey mineral produce, and the scheme of general traffic a secondary object; and shewing that there was a considerable quantity of coal in the neighbourhood of the demised land, the injunction was dissolved.

Held, by the Lord Chancellor discharging the latter order, and restoring the injunction, that this being a question for a court of law upon the construction of the reservation, the property ought to be protected pending the necessary trial at law; and it was made a condition of granting the injunction that the plaintiff should proceed to a trial of the question at the earliest possible opportunity. *Farrow v. Vansittart*, 602

NOTICE.

LINE OF RAILWAY.

See COMPLETION OF LINE.

MANDAMUS.

See BOND.

CHANNEL OF RIVERS.

CONSTRUCTION OF STATUTES, 15,
16.

ENROLMENT.

LANDLORD AND TENANT, 2.

MAP.

See EVIDENCE.

MULTIFARIOUSNESS.

See PLEADING, 1.

NAVIGATION.

See OBSTRUCTION.

NOTICE

To treat for or take compulsorily lands in the line of a railway, under power conferred by Railway Acts.

1. A notice to treat for lands constitutes the relative situation of vendor and purchaser, as between a Company and the owner of property. *Doo v. The London and Croydon Railway Co.*, 257

2. A notice to treat for lands constitutes the relative situation of vendor and purchaser, and a jury cannot be summoned to assess the value of a less quantity of land than that for which they have given a notice to treat. *Stone v. The Commercial Railway Co.*, 375

3. A Railway Company have no power to summon a jury to assess the value of lands, as to which they have given no previous notice to treat. *Ibid.*

4. A notice to treat for part of a rope-walk in the line of a railway, was accompanied by a diagram or plan of the rope-walk, indicating by coloured

NUISANCE.

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lines the manner in which the railway would intersect it, and the portion required to be treated for, but having no scale of admeasurement appended to the diagram or plan:—*Held*, that the notice was sufficient. *Sims v. The Commercial Railway Co.*, 431

NOTICE TO QUIT.

See LANDLORD AND TENANT.

NOTICE OF OBSTRUCTION TO NAVIGATION.

See OBSTRUCTION.

NUISANCE.

Public and Private.

1. A Railway Company erected near to the premises of the plaintiffs certain ovens for the making of coke for working their locomotive engines, and commenced using such ovens in the month of April, 1838. In the month of August following (some correspondence having taken place in the meantime) the plaintiff filed his bill complaining of nuisance arising from the use of the ovens, and praying an injunction to restrain the same. The nuisance set forth in the bill, and referred to in the affidavits, was threefold; first, injury to health; second, injury to the enjoyment of the dwelling-house, and deterioration of property; third, the increased danger of fire. Counter affidavits on these points were filed on behalf of the Company, and also affidavits shewing that the coke works were necessary to the carrying on of the business of the Company.

Held, that the jurisdiction of the Court of Chancery, in a case like the present, exists for the purpose of protecting a legal right, and is not an original jurisdiction, and that no reason being shewn why the plaintiff had not proceeded in the first instance to establish his right at law, the Court would not, on conflicting affidavits, try the

question of nuisance, and, therefore, that the injunction could not be sustained. *Semple v. The London and Birmingham Railway Co.*, 120

2. *Held*, that individuals who suffer a special damage from a public nuisance, may sustain a bill to be relieved therefrom, without the Attorney-General being a party to the suit. *Spencer v. The London and Birmingham Railway Co.*, 159

3. Acquiescence by the party complainant in the erection of works alleged to be a public nuisance, and in violation of an act of Parliament, may, before the legal question has been tried, prevent the Court from granting an injunction, which would indirectly have the effect of compelling the removal of the part of the works already built; although in the same case the Court may, pending the trial at law, restrain the further proceeding with the works. *The Attorney-General, at the relation of Fawcett v. The Manchester and Leeds Railway Co.*, 436

OBSTRUCTION.

In an act of Parliament, which authorized a Company to make a navigable canal and to take tolls, &c., there was a provision that *it should be lawful* for the Company, if any boat were sunk in the canal, to cause the same to be weighed and drawn up. The declaration stated, that a boat was sunk in the canal, and impeded the navigation, and that the Company did not, within reasonable time after notice thereof, raise the boat, or place any signal, or give notice of the obstruction; so that a fly-boat of the plaintiff's ran foul of the sunken boat, and was damaged.

Held, that the clause in question did not impose upon the Company any obligation to raise such boat, but that, by the common law, it was obligatory upon them to take reasonable care that

PLEADING.

all persons who navigated the canal should do so without danger.

And that such duty and liability might be implied from the fact stated in the declaration, though it contained no actual averment of such duty. *The Company of Proprietors of the Lancaster Canal Navigation v. Parnaby and Others*, 696

OPPOSITION,

Withdrawal of, to bill in Parliament.

See AGREEMENT.

PARTIES.

See PLEADING, 2, 3, 4.

PEER OF PARLIAMENT.

See AGREEMENT, 11.

PLEADING.

(*Equity.*)

1. The plaintiff entered into three contracts in writing with a Railway Company, whereby it was agreed (*inter alia*), that the engineer of the Company should, every fortnight, ascertain the value of the work done according to its quantity and relative proportion to the whole works, and that the plaintiff should thereupon receive £80 per cent. of such value, the remaining £20 per cent. being reserved by the Company until such reserve amounted to £4000. That, if the engineer of the Company should not be satisfied with the works, the Company should be enabled, after notice given to the contractor, and his default of a satisfactory compliance with its terms for the space of seven days, to take possession of the works, and thereupon not only the plant and materials of the contractor, but also the value of the work done and not paid for, and the reserve fund, should become forfeited to the Company.

For the performance of two of the contracts, the plaintiff, with two sureties, and for the performance of the

third with such two and an additional surety, executed joint and several bonds to the Company.

A further contract, not in writing, was entered into by the plaintiff and the Company, for executing certain other parts of their works at stipulated prices.

In the course of the work the Company advanced several sums of money to the plaintiff upon the security of his plant and machinery upon the works comprised in the written contract, and of the reserve fund.

The Company, having given a notice as above mentioned, and having, at the expiration of seven days therefrom, taken possession of the works, plant, and machinery comprised in all the contracts, the plaintiff filed his bill, insisting that the engineer had not so estimated the works as to give to the plaintiff the £80 per cent. to which he was entitled, and that upwards of £30,000 was due to him under the several contracts for works actually completed, insisting that no forfeiture had been incurred by him, and that, by the terms of the deed of mortgage, the use and possession of the plant and machinery thereby assigned to the Company, was expressly reserved to the plaintiff; and praying that the Company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end; and praying, in either alternative, for the taking of accounts between the plaintiff and the Company. *Held*, that a demurrer to the bill on the ground of multifariousness, could not be sustained. *Ranger v. The Great Western Railway Co.*, 1

2. *Held* by the Vice-Chancellor, on demurrer, that individuals who suffer a special damage from a public nuisance, may sustain a bill to be relieved therefrom, without the Attorney-General being a party to the suit. *Spencer v.*

The London and Birmingham Railway Co., 159

3. A bill was filed by a vendor against a purchaser, averring, that, before completing the contract, the purchaser had entered on the land, and praying a specific performance, and in the meantime an injunction to restrain the defendant from entering on, or continuing to hold, the premises. *Held*, that a tenant of the land contracted to be sold, is not a necessary party. *Robertson v. The Great Western Railway Co.*, 459

4. The plaintiff, a lessee of a wharf and premises, of which the Regent's Canal Company were the proprietors, had covenanted to bear, in common with other lessees, the expense of keeping in repair a private road, called the Commercial-road, leading from his premises to a public road.

The London and Birmingham Railway Acts provide, that the Company shall not take, use, damage, pass along, or interfere with the said Commercial-road, without the previous consent of the Regent's Canal Company under their common seal.

A contractor for the railway works having deposited clay on the road to a quantity injurious to the plaintiff's premises, he filed a bill to restrain the nuisance. *Held*, that the Canal Company were not necessary parties to the suit. *Semple v. The London and Birmingham Railway Co.*, 480

(*Law.*)

5. In an action for calls on railway shares, the Court refused to allow the defendant to plead, 1st, that due notice of the calls was not given, pursuant to the act of Parliament; 2ndly, that no time, place, or person was appointed for the payment of the calls; 3rdly, that the calls were made for other purposes than those mentioned in the act; 4thly, that the Company had made deviations not warranted by

the act, and that the calls were made for the purpose of those deviations; 5thly, that at the time of making the calls there were not 36,000 shares in the Company, as provided by the act. *The London and Brighton Railway Co. v. Wilson; Same v. Fairclough,*

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In an Act of Parliament, which authorized a Company to make a navigable canal, and to take tolls, &c., there was a provision, that *it should be lawful* for the Company, if any boat were sunk in the canal, to cause the same to be weighed and drawn up. The declaration stated, that a boat was sunk in the canal, and impeded the navigation, and that the Company did not, within reasonable time after notice thereof, raise the boat, or place any signal, or give notice of the obstruction, so that a fly-boat of the plaintiff's ran foul of the sunken boat, and was damaged.

Held, that the clause in question did not impose upon the Company any obligation to raise such boat, but that by the common law it was obligatory upon them to take reasonable care that all persons who navigated the canal should do so without danger: *And* that such duty and liability might be implied from the facts stated in the declaration, though it contained no actual averment of such duty. *The Company of Proprietors of the Lancaster Canal Navigation v. Parnaby and Others,*

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PRACTICE.

(Equity.)

1. An injunction may be granted *ex parte*, notwithstanding the defendant has appeared to the bill. *Bell v. The Hull and Selby Railway Co.,*

623

(Law.)

2. Right to begin. *The Queen v. The London and Birmingham Railway Co.,*

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TURNPIKE ROAD.

PUBLIC POLICY.

See AGREEMENT, 11.

RAILWAY.

See PASSIM.

REVERSION.

See LEASE, 2.

ROADS.

See CONSTRUCTION OF ACTS OF PARLIAMENT, 1, 2, 5, 6, 8, 15, 16.
TURNPIKE ROAD.

1. A power to take, for temporary purpose, making a temporary substituted road in the meantime. *Spencer v. The London and Birmingham Railway Co.,*

159

2. Power to cross by a viaduct. *The Attorney-General, at the relation of Fawcett, v. The Manchester and Leeds Railway Co.,*

436

3. Power to take for permanent purpose, making a permanent substituted road. *Kemp v. The London and Brighton Railway Co.,*

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SHERIFF.

See CONSTRUCTION OF STATUTES, 17

SPECIFIC PERFORMANCE.

See AGREEMENT.

STATUTES.

See CONSTRUCTION OF STATUTES.

TRIAL AT LAW.

See ACTION AT LAW.

INJUNCTION, 2.

TURNPIKE ROAD.

An act of Parliament gave power for an unlimited period to a Company, to make and keep in repair a bridge and road, and to erect thereon toll-houses and gates, and to take tolls (which were not to be rated to the

UNDERTAKING.

poor); and enacted, that all roads thereby directed to be made should be taken to be turnpike roads within the meaning of the General Turnpike Act, (13 Geo. 3, c. 84).

The 13 Geo. 3, was repealed by 3 Geo. 4, c. 126. The latter act was amended by 4 Geo. 4, c. 95, which, reciting that doubts had arisen as to the roads to which 3 Geo. 4 was intended to apply, enacted, that nothing in that act should extend to roads not under the care of trustees or commissioners, or which were under acts passed for an unlimited period, although tolls were taken thereon.

Held, that (independently of the declaration in the statute) the road in question, being one on which the public had a right to pass on paying toll, and on which toll-houses were lawfully erected, was a turnpike road. *The Company of Proprietors of Northam Bridge and Roads v. The London and Southampton Railway Co.*, 665

UNDERTAKING.

1. An undertaking entered into with a Court of equity is equivalent to and will have the effect of an injunction, so far that any infringement thereof may be made the subject of an application to the Court. *The London and Birmingham Railway Co. v. The Grand Junction Canal Co.*, 224

2. A Railway Company, as the terms of being permitted to proceed with certain works, pending a trial at law of the question, whether such works were in conformity with the directions of an act of Parliament, undertook to deal with the works as the Court of Chancery should afterwards direct. Before the trial had taken place, the Company, without notice to the other parties in the cause, petitioned the House of Commons for leave to bring in a bill, one of the clauses of which proposed to provide, that in all pro-

WASTE.

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ceedings at law and in equity, the works which had been done should be considered as a compliance with the act of Parliament, and that there should be no power at law or in equity to compel the removal thereof. The petition was received, and the bill containing such clause was introduced into the House of Commons.

Held, that, although the conduct of the Company was a violation of the undertaking entered into by them, the Court had no jurisdiction to restrain them from further soliciting the bill, which, having been entertained by the House of Commons, had become the proceeding of the Legislature, and not of the petitioners. *The Attorney-General, at the relation of Fawcett v. The Manchester and Leeds Railway Co.*, 436

3. Upon an agreement by a Railway Company to pay the amount of damage done to land by severance, and to take proper proceedings, if necessary, for ascertaining such amount, an injunction restraining them from entering upon adjoining land until the amount of such damage was ascertained, was withheld. *Jones v. The Great Western Railway Co.*, 684

VENDOR AND PURCHASER.

See AGREEMENT.

VERDICT.

See EVIDENCE, 1.

WAIVER.

See INJUNCTION, 1.

WARRANT.

See CONSTRUCTION OF STATUTES, 17.

WASTE.

See INJUNCTION, 3.

WORKS, RAILWAY.

See COMPLETION OF LINE.

1. Although a Railway Company are not to act capriciously in regard to carrying out the powers of the act of Parliament, the act constitutes them the judges of the most convenient mode of conducting the works. *The London and Birmingham Railway Co. v. The Grand Junction Canal Co.*, 224

2. A Railway Company, in the course of their works, caused excavations to be made in their own land, within three feet of the walls of the houses belonging to the plaintiffs, and to a depth of fifteen feet lower than the foundations of such houses.

On affidavits, that the houses had been undermined, and were in danger of falling in, and that the lives of the

occupants would not be in safety if the excavation was allowed to proceed, the plaintiffs obtained an injunction *ex parte*, restraining the Company from making further excavations.

On affidavits on the part of the Company, stating that the excavation had not endangered, and, if proceeded with in the ordinary manner, would not endanger the houses; and that the giving away of one of the houses was owing to the wall thereof being very old and badly built, and to the taking down of an adjoining building, the Court dissolved the injunction, with costs. *Wardourton v. The London and Blackwall Railway Co.*, 558

YARD.

Definition of.

See CONSTRUCTION OF STATUTES, 7.

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